Cameron Wallace
206 West 96th St. Apt. 2C
New York, NY 10025
(318) 840-3253
cfw2127@columbia.edu

June 26, 2023

The Honorable Stephanie Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin U.S. Courthouse
231 W. Lafayette Blvd.
Detroit, MI 48226

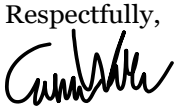
Dear Judge Davis:

I am a recent graduate of Columbia Law School. For the 2023-24 term, I will be clerking for Judge Sarah Vance in the United States District Court for the Eastern District of Louisiana. Accordingly, I write to apply for a judicial clerkship in your chambers for the 2024-25 term.

Enclosed please find a resume, transcripts, and two writing samples. Also enclosed are letters of recommendation from Professors Michael Doyle (212 854-3061, md2221@columbia.edu); Frederick Davis (212 909-7420, ftd3@columbia.edu), and Stephen Yale-Loehr (607 255-0348, swy1@cornell.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,



Cameron Wallace.

Cameron F. Wallace

206 West 96th St., Apt. 2C, New York, NY 10025 | 318.840.3253 | cfw2127@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. May 2023
Honors: Harlan Fiske Stone Scholar (Academic Honor)
Harlan Fiske Stone Moot Court Semifinalist
Activities: *Journal of Transnational Law*, Managing Editor
Society for Immigrant and Refugee Rights, Policy Chair
Intro to American Politics TA (Columbia College)
Corporations TA
Moot Court Student Editor/Legal Practice Workshop TA

Cornell Law School, Ithaca, NY
Academic Year 2020-21 (Transfer)
Honors: Invited to join *Cornell Law Review* and Supreme Court Bulletin based on writing competitions

Rice University, Houston, TX
B.A. English and European Studies May 2020
Honors: Distinction in Research and Creative Works
Trustee Distinguished Scholar
Study Abroad: IAU College, Aix-en-Provence, France (Fall 2018)

EXPERIENCE

U.S. District Court for the Eastern District of Louisiana, New Orleans, LA
Law Clerk to Judge Sarah S. Vance 2023-24
Will assist federal judge in conducting research, drafting orders and opinions, and managing cases.

U.S. District Court for the Eastern District of New York, New York, NY
Federal Court Clerk Extern to Magistrate Judge Peggy Kuo Fall 2022
Shadowed a federal judge; assisted with legal research and writing opinions.

Ropes & Gray LLP, New York, NY
Summer Associate Summer 2022
Worked in corporate practice group and on pro bono asylum representation and legal outreach projects.

Columbia Law School, New York, NY
Research Assistant to Professor Michael Doyle Spring/Summer 2022
Edited chapters for upcoming publication, suggesting above- and below-line revisions.

Cornell Law School, Ithaca, NY
Research Assistant to Professor Stephen Yale-Loehr Summer 2021
Updated sections of *Immigration Law and Procedure* by Yale-Loehr, Gordon, Mailman, and Wada.

New York State Division of Human Rights, White Plains, NY
Investigations Intern Winter 2020-21
Interviewed and sought documentary evidence from parties to verify complaints. Produced reasoned final reports.

INTERESTS

Building electric guitars, Modernist literature, algorithmic music composition.

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/18/2023 00:13:16

Program: Juris Doctor

Cameron Ford Wallace

Transfer Credits: 31.0

Course Credits: Contracts; Torts; Civil Procedure; Constitutional Law; Criminal Law; Property; Moot Court

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Wu, Timothy	3.0	A-
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	A-
L6506-1	Gender Justice	Franke, Katherine M.	2.0	A-
L6355-1	Health Law	Elberg, Jacob	3.0	CR
L6640-1	Journal of Transnational Law		0.0	CR
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6392-1	Commercial Finance and Secured Transactions	Mann, Ronald	4.0	A-
L6652-1	Ex. Federal Court Clerk EDNY	Kovner, Rachel; Liss, Jeremy	1.0	CR
L6652-2	Ex. Federal Court Clerk EDNY - Fieldwork	Kovner, Rachel; Liss, Jeremy	3.0	CR
L6640-1	Journal of Transnational Law		0.0	CR
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR
L6367-1	Professional Responsibility for the Transactional Lawyer	Tepper, Steven	2.0	A-
L8812-1	S. Public Integrity and Public Corruption [Minor Writing Credit - Earned]	Briffault, Richard	2.0	A-
L6822-1	Teaching Fellows	Mitts, Joshua	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A
L6640-1	Journal of Transnational Law		0.0	CR
L6169-1	Legislation and Regulation	Metzger, Gillian	4.0	A-
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L8072-1	S. Advanced Constitutional Law: Reading the Constitution	Amar, Akhil	2.0	A-

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Goshen, Zohar	4.0	A-
L6242-1	Environmental Law	Gerrard, Michael	3.0	B+
L6276-2	Human Rights	Flaherty, Martin	3.0	B+
L6640-1	Journal of Transnational Law		0.0	CR
L6675-1	Major Writing Credit	Davis, Frederick	0.0	CR
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6683-1	Supervised Research Paper	Davis, Frederick	2.0	CR
L6674-1	Workshop in Briefcraft	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	3L
2021-22	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0

Cornell Law School - Grade Report - 06/21/2021

Cameron Ford Wallace

JD, Class of 2023

Course	Title	Instructor(s)	Credits	Grade	
Fall 2020 (8/25/2020 - 11/24/2020)					
LAW 5001.3	Civil Procedure	Rachlinski	3.0	A+	CALI
LAW 5021.2	Constitutional Law	Tebbe	4.0	A	
LAW 5041.3	Contracts	Taylor	4.0	A	
LAW 5081.3	Lawyering	McKee	2.0	B+	
LAW 5151.1	Torts	Schwab	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.9162
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.9162

^ Dean's List

Spring 2021 (2/2/2021 - 5/7/2021)					
LAW 5001.3	Civil Procedure	Holden-Smith	3.0	B+	
LAW 5061.3	Criminal Law	Yellen	3.0	B+	
LAW 5081.3	Lawyering	McKee	2.0	A-	
LAW 5121.1	Property	Underkuffler	4.0	A	
LAW 6661.1	Constitutional Law of the European Union	Lasser	3.0	A	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.6880
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.8058

^ Dean's List

Total Hours Earned: 31

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Cameron Wallace for your clerkship. Cameron is an outstanding student who transferred this past year from Cornell Law School to Columbia Law School, where he has continued to excel. He made the dean's list at Cornell in his first year and is on track for similar honors here at Columbia. During the past semester he has served as my research assistant helping to edit a manuscript entitled Cold Peace for publication by WW Norton.

Cameron's work as an editorial assistant has involved the meticulous correction of the footnotes, preparation of the bibliography and the careful reading of the text for the purpose of offering valuable suggestions on both the content and the prose. He has performed these tasks superbly while managing his time to allow the completion of his course work and extracurricular activities in support of Columbia's immigration rights programs.

The quality of his own research is well-illustrated in the Note he wrote this past year on the "2016 Europol Regulation," which provides the legal basis for the operation of Europol under Article 88 of the Treaty on the Functioning of the European Union. He persuasively argues that even though the Regulation successfully created an effective law enforcement intelligence organization, recent amendments have expanded the organization's mandate, providing it with new operational tools whose impact is likely to be too broad. Given the record of past Europol developments he surveys, the new capacities are likely to outstrip the additional data protection, privacy, and oversight mechanisms included within the proposal. The absence of effective oversight, accountability, and privacy protection measures threatens the fundamental rights of the European citizenry. The note is deeply researched, clearly argued and lucidly written.

Cameron hopes to prepare himself for a career in academics as a law professor and looks forward to rigorous engagement with the legal research and writing that a clerkship offers. In addition to his talents as a researcher, he thoroughly enjoys working in teams. As evidence of his talents as a team leader he has been elected managing editor of the Journal of Transnational Law and Policy Chair at the Society for Immigrant and Refugee Rights.

I recommend him enthusiastically and without any reservation. I would be happy to elaborate or answer any questions at 917 499-3185.

Sincerely yours,

Michael W. Doyle
University Professor
of Law, Political Science and International Affairs

Michael Doyle - md2221@columbia.edu - 212-854-3061

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

Cameron Wallace, who is a member of the Columbia Law School Class of 2023, has asked me to write about my experience working with him at Columbia, which I am happy to do since I have worked with Cameron quite a bit. I think very highly of Cameron, and believe that he would be an excellent law clerk.

In addition to my law practice, I am a Lecturer in Law at Columbia, where I teach two courses related to criminal procedure, and engage in a fair amount of writing in the area. My interactions with Cameron consisted of reviewing and helping develop his paper on Europol and its role in data management, on which I met with him on a number of occasions during the 2021-2022 academic year.

I was very impressed with Cameron and the work he did on his note. The topic he chose is unusually interesting, topical – and complex, thus exactly the kind of issue on which students can get a bit lost. Cameron was notably disciplined in his analysis and writing, and developed a very useful piece. I very much enjoyed our meetings, since he is a fine young future lawyer, and it was a pleasure to work with him.

I am likely to be working with him further in the coming year since he was elected as a managing editor of the Columbia Journal of Transnational Law, on which I serve as a faculty adviser and member of the Board. The Journal attracts some of the best students at Columbia and was exceptionally well led and managed this last year, so Cameron's elevation is indicative of the trust his colleagues have in his abilities and work.

I have every reason to believe that he would be an unusually effective and reliable law clerk. I would be glad to provide any further information if that would be useful.

Respectfully,

Frederick T. Davis

Davis Frederick - ftd3@columbia.edu

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

This is a letter of recommendation on behalf of Cameron Wallace. I first got to know Cameron in the summer of 2021, right after he finished his 1L year at Cornell Law School. I hired Cameron as a research assistant to help update my immigration law treatise. Given all the recent immigration changes, Cameron was quite busy! He was already an excellent writer and researcher when I hired him, but he got even better. Cameron became quite good at quickly determining the essence of a case or regulation, where it should go in the treatise, how to explain it to the average user, and how it fit into the overall scheme of immigration law. He knew when to ask questions and when to figure out answers on his own.

As one example, Cameron updated the section of my treatise concerning the public charge ground of inadmissibility. This is a particularly complicated area of immigration law, with many recent regulatory changes and a lot of litigation. Cameron updated that part of the treatise admirably. I made very few changes to his update.

In speaking with Cameron, I know that he loves legal research and writing and learning about court procedure and practice. I would have loved to keep him on as a research assistant, but unfortunately for me he decided to transfer to Columbia Law School. There he has served as a research assistant to a law professor and written a Note for the Columbia Journal of Transnational Law. I understand that he will be a managing editor for the Journal of Transnational Law this coming year.

As a former law clerk to a federal judge myself, I know the importance of hiring someone with an excellent combination of legal research skills, writing ability, intellectual firepower, and the ability to work well with others. Cameron combines all four characteristics incredibly well. Moreover, he is nice, mature, and easy to work with.

For all these reasons, I enthusiastically recommend Cameron for a clerkship with you.

If you have any questions, please call me at (607) 379-9707.

Sincerely,

Stephen Yale-Loehr
Professor of Immigration Law Practice

Stephen Yale-Loehr - swy1@cornell.edu - 607-254-4759

Cameron F. Wallace

206 West 96th St. Apt. 2C, New York, NY 10025 | 318.840.3253 | cfw2127@columbia.edu

Writing Sample – Surviving the Stench: Toward a Principled Model of Precedent

This writing sample derives from a final paper submitted for a seminar on advanced constitutional law taught by Professor Akhil Amar. The assignment was to write a 15-25 page paper about some aspect of constitutional law. My submission was written shortly after a copy of the Supreme Court's draft opinion in the case of *Dobbs v. Jackson Women's Health Organization* was leaked to the public. For the purposes of this writing sample, some material has been removed for length and some material has been revised for clarity.

This submission is solely my own work and has not been edited by anyone else.

TABLE OF CONTENTS

INTRODUCTION

"Will this institution survive the stench that [overruling *Roe* and *Casey*] creates in the public perception that the Constitution and its reading are just political acts?" Justice Sotomayor asked counsel for the petitioner at oral arguments in the pending case of *Dobbs v. Jackson Women's Health Organization*.[1] As the petitioner's counsel, Mr. Stewart, began to answer, Justice Sotomayor interrupted once again.[2] "I don't see how it is possible…If people actually believe that it's all political, how will we survive? How will the Court survive?"[3] A leaked draft opinion for the case released by POLITICO last week[4] did not squarely address the standard by which the majority had judged that *Roe* and *Casey* were wrongly decided.[5] It made reference to the fact that some previous cases had held that stare decisis "is at its weakest when we interpret

[1] Transcript of Oral Argument at 15, Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021) (No. 19-1392).
[2] *Id.*
[3] *Id.*
[4] Josh Gerstein and Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, POLITICO (May 3, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.
[5] Draft Opinion at 35-39, Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021) (No. 19-1392), available at https://www.politico.com/f/?id=00000180-874f-dd36-a38c-c74f98520000.

the Constitution,"[6] but it also addressed many of the factors that *Casey* outlined as necessary considerations for overruling a special precedent such as *Roe*.[7]

The naked, earnest, and exasperated expression of anxieties about the Court's legitimacy and survival by Justice Sotomayor was striking, but it begged the question whether the Court should consider these kinds of factors as rules of decision when evaluating a case. It is incontrovertible that, at some level, stare decisis plays an important role in maintaining the legitimacy of the Court[8] and that the Court's legitimacy is critical to its survival, authority, and ability to bring its judgments to bear on any parties concerned.[9] However, the Court's legitimacy is better served by demonstrating a record of principled decision-making than by refusing to admit errors when they occur.[10] Historically, the Court has failed to develop a consistent, principled doctrine of stare decisis,[11] and, while academics have addressed the doctrine as a pragmatic outgrowth of administration,[12] an intellectual exercise,[13] and an incident to Constitutional interpretation,[14] few have drawn on the deep history of the doctrine for the purpose of evaluating current practice and outlining a specific, principled method of applying the doctrine rooted in the Constitution.[15]

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[6] *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).
[7] *Id.*
[8] *See generally* Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).
[9] *See generally* MATTHEW E.K. HALL, THE NATURE OF SUPREME COURT POWER (2011). For an illuminating discussion and analysis of the requirement of social and institutional cooperation in effectuating judicial business, see generally Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).
[10] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 236-41 (2012).
[11] *See generally* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008).
[12] *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).
[13] *See, e.g.*, NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT (2008).
[14] *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS ch. 4 (1925).
[15] Thomas Lee comes the closest in *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645 (1999). However, this work is primarily descriptive, and focuses on a smaller time period than this paper will examine.

This Essay will advance an argument that the Court should protect its legitimacy interests through the principled application of a consistent stare decisis framework. Part I of this Essay will examine the doctrine's historical development, the extent to and manner in which it was codified in the Constitution, and its modern application to Constitutional adjudication. It should be noted that this Essay will focus solely on stare decisis within the context of Supreme Court review of its own prior decisions regarding Constitutional issues; it is not intended to address any other horizontal or vertical questions of precedent. Part II will suggest a new framework for applying stare decisis in constitutional cases.

I. HISTORICAL ORIGINS OF AND MODERN APPROACHES TO STARE DECISIS

Stare decisis has a complicated history, the roots of which extend throughout the life of the common law.[16] Historians and legal scholars widely understand the modern conception of the doctrine to have arisen, at the earliest, in the 18th century.[17] The history of the doctrine is complicated by the fact that its evolution is intimately bound up with and part of a broader history of radical social, economic, political, and legal changes.[18] Systemic changes in the way that the law is conceptualized have been almost perpetual in the American legal system up until as late as the 20th century,[19] including the fusion of the systems of law and equity in institutional design, which had wide-ranging effects on legal practice and philosophy.[20]

These radical upheavals in legal thought have had significant effects on the way that stare

[16] *See* THEODORE PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 342 (5th ed. 1956); *See generally* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW (Paul Brand & Joshua Getzler eds., 2012).
[17] Lee, *supra* note 15, at 645.
[18] *See generally* Simeon Baldwin, THE HISTORY OF THE COMMON LAW: CONSIDERED WITH SOME REFERENCE TO ITS RELATION TO POLITICS, ECONOMICS, LANGUAGE, LITERATURE, ART, AND RELIGION (1906).
[19] *See* Eerie R.R. v. Tompkins, 304 U.S. 64, 77-80 (1938).
[20] *See generally* Kellen Funk, *The Union of Law and Equity*, in EQUITY AND LAW (John Goldberg, Henry Smith, & P.G. Turner eds., 2019).

decisis is conceived.[21] This Part will examine how the preconditions for the modern doctrine of precedent developed, examining first the procedural preconditions such as reporting practices and second the philosophical preconditions of modern theories of law. Finally, this Part will describe contemporary approaches to stare decisis.

A. Development of Procedural Preconditions

The early historical origins of stare decisis and the binding effect of legal precedent are widely explored by legal historians and scholars.[22] The most significant early evidence of the role of precedent in adjudication in the common law system can be seen in the evolution of reporting systems in England and, later, in America.[23]

In the 13th century, the first English Year Book was published,[24] and for the next two centuries these resources would prove enormously important as rudimentary records of case-law.[25] They contained collections of discursive descriptions of legal proceedings.[26] In the 15th and 16th centuries, pleadings became written rather than oral, which laid the groundwork for the modern conception of court opinions as written evidence of a judge's independent reflections.[27] The publication of the official Year Books ended in the 16th century, and from that point until (and through) the American revolution, law reporting in England was a private enterprise

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[21] *See* MICHAEL LOBBAN, THE JURISTS' PHILOSOPHY OF LAW FROM ROME TO THE SEVENTEENTH CENTURY 33-40 (Andrea Padovani and Peter Stein eds., 2007).

[22] *See generally* ROSCOE POUND, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW (2d ed. 1913); MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850 (1991); Ayelet Ben-Yishai, *Victorian Precedents: Narrative Form, Law Reports, and Stare Decisis*, 4 L., CULTURE, AND THE HUMANITIES 382 (2008).

[23] *See* Hart v. Massanari, 266 F.3d 1155, 1165-66 (9th Cir. 2001).

[24] FREDERIC MAITLAND & FRANCIS MONTAGUE, SKETCH OF ENGLISH LEGAL HISTORY 203 (James Colby ed., 1915).

[25] *See* Henry N. Ess III, *A Talk Given at the Association of the Bar of the City of New York*, HARVARD LAW SCHOOL LIBRARY (Nov. 28, 1978), https://hls.harvard.edu/library/historical-special-collections/the-collections/rare-books-early-manuscripts/sixteenth-century-english-lawyers-library/.

[26] W. S. Holdsworth, *Influence of Coke on the Development of English Law*, in ESSAYS IN LEGAL HISTORY (Paul Vinogradoff ed., 1913); W.S. HOLDSWORTH, 2 A HISTORY OF ENGLISH LAW 444-58 (1909).

[27] JOHN LANGBEIN, RENÉE LERNER, & BRUCE SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS ch. 4 § V.B (2009).

undertaken by individuals.[28] The quality and usefulness of reporters' work product varied widely, and a number of problems plagued this system.[29]

Case reporting, especially at the federal level, was not a meaningful part of the American legal landscape at the time of the Founding.[30] Even as case reporting became more prevalent in subsequent decades, the practice was unreliable, often undertaken by individuals for profit who likely occasionally altered the facts or legal analysis of the judgment.[31] Additionally, in these early days, judgments would be issued seriatim,[32] which made it much more difficult to discern the *ratio decidendi* of the Court *qua* Court for a particular case.[33] This kind of reporting was clearly not designed to produce clean narratives that could be distilled into coherent rules.[34] It was designed to give readers the learned opinions of the individual justices, since each of them could be probative as to the true legal principles which should have been operative in the case.[35]

B. Development of Philosophical Preconditions

One of the most important factors in the rise of the modern conception of stare decisis is the evolution of legal philosophy.[36] Under the declaratory model of law, legal rules, including

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[28] Van Vechten Veeder, *The English Reports, 1292-1865*, 15 HARV. L. REV. 1, 3 (1901).
[29] *Id.* at 3-5.
[30] Hart v. Massanari, 266 F.3d 1155, 1168-69 (9th Cir. 2001).
[31] *See* Erwin Surrency, *Law Reports in the United States*, 25 THE AM. J. OF L. HIST. 48, 51 (1981).
[32] Karl ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 192 (1959).
[33] In many ways, of course, this problem persists today, despite the shift to consolidated opinion-giving. *See generally* Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995); John Davis & William Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 59 DUKE L.J. 59 (1974).
[34] *See* Thomas Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 827-30 (2018).
[35] *See* Thomas Jefferson, Letter to Justice William Johnson October 27, 1822 ("the judges of England…delivered their opinions seriatim, with the reasons and authorities which governed their decisions…Besides the light which their separate arguments threw on the subject, and the instruction communicated by their several modes of reasoning, it shewed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent.").
[36] *See generally* LOBBAN, THE JURISTS' PHILOSOPHY, *supra* note 21.

unwritten "common law" rules, preexist a judge's identifying them.[37] Under this theory, a court's opinion could only be persuasive evidence of a rule which existed before that opinion and would exist even if that court had pronounced a different, "erroneous" rule.[38] Today, there are numerous schools of legal thought, all of which might characterize judicial activity differently;[39] however, on a fundamental level, most modern legal thought understands judicial decision-making as judicial rulemaking rather than rule discovery.[40]

One of the earliest common law treatises to engage seriously with case-law was *Bracton*, published in the thirteenth century.[41] The content of the treatise was essentially a collection of court judgments editorialized and organized in order to demonstrate certain legal principles and rules.[42] The strength of scholarship within the treatise was not exceptional, and its usefulness was limited even at the time of its publication, though it later made a resurgence.[43]

In the sixteenth and seventeenth centuries, Sir Edward Coke would undertake a similar project–the creation of one of the first series of case books–which resulted in significantly more success and utility.[44] Due to his mastery of the Year Books and his preternatural ability to wield case law in order to accomplish the politico-institutional aim of strengthening the English judiciary against the Crown, Coke played a pivotal role in the development of the idea of

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[37] *See* WILLIAM HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 23 (1716) ("I…ftile thofe Parts of the Law, Leges non Scripte, becauf their Authoritative and Original Inftitutions are not fet down in Writing in that Manner, or with that Authority that acts of Parliament are; but they are grown into Ufe, and have acquired their binding Power and Force of Laws by a long and immemorial Ufage, and by the Strength of Cuftom and Reception in this Kingdom").

[38] *Id.*

[39] *See* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691-95 (1989) (discussing the history and evolution of the legal process and legal realism schools).

[40] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938); Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. OF L. STUDIES 421, 422 (2013).

[41] PLUCKNETT, *supra* note 16, at 342; LOBBAN THE JURISTS' PHILOSOPHY, *supra* note 21, at 2.

[42] LOBBAN THE JURISTS' PHILOSOPHY, *supra* note 21, at 3-4.

[43] *Id.*

[44] *See* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 62-66 (2001).

precedent as law.[45]

In 1765, William Blackstone published the *Commentaries,* and while many commentators associate him with the declaratory theory of law, his writing actually reveals a highly complicated perspective on precedent.[46] For example, he states that, "it is an eftablifhed rule to abide by former precedents," and notes that "the law in that cafe being folemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breaft of any fubfequent judge to alter or vary from, according to his private fentiments."[47] Even "where the former determination is moft evidently contrary to reafon…the fubfequent judges do not pretend to make a new law, but to vindicate the old one from mifreprefentation."[48]

The conception of precedent in early American jurisprudence is more ambiguous, reflecting the nascent idea that precedent may be more than simply evidence of some preexisting Platonic rule of law.[49] For example, Alexander Hamilton's perspective on the doctrine of precedent seems to indicate a fairly strong view, as he writes in the Federalist Papers, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[50]

In an oft-cited letter, James Madison also seems to suggest that, 1) "Judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and

[45] *Id.*
[46] See Lee *supra* note 15, at 661-63.
[47] WILLIAM BLACKSTONE, COMMENTARIES 69 (1765).
[48] *Id.* at 69-70.
[49] *See* Mortimer Sellers, *The Doctrine of Precedent in the United States of America*, 54 THE AM. J. OF COMP. L. 67, 69-72 (2006).
[50] THE FEDERALIST NO. 78 (Alexander Hamilton).

repetitions, [should be] regarded as of binding influence, or rather of authoritative force, in settling the meaning of a law" and 2) some level of deference to precedent is required by the Constitution.[51] However, the letter is complicated first by the framing device that Madison uses to establish this discussion and second by its somewhat inscrutable grammatical construction.[52] For example, the nature of the distinction between "binding influence" and "authoritative force" is elusive and yet crucial to understanding Madison's point.

Justice Joseph Story is decidedly more emphatic about the binding nature of precedent, describing stare decisis as "This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications" which "was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mete discretion, and to the abandonment of all the just checks upon judicial authority."[53] In fact, Story, argues, "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."[54] He also identifies a number of justifications for the rule, including certainty, safeguarding principled decision-making, and protecting individual liberty.[55]

Taken together, these perspectives illustrate that horizontal precedent has never been understood as an "inexorable command,"[56] but has indeed, since at least Blackstone's time, been

[51] James Madison, Letter to Charles J. Ingersoll, June 25, 1831, https://founders.archives.gov/documents/Madison/99-02-02-2374.
[52] *Id.*
[53] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377-78 (1833).
[54] *Id.* at § 377.
[55] *Id.*
[56] Lawrence v. Texas, 539 U.S. 558, 577 (2003).

viewed as a serious, foundational element of common law adjudication, deviation from which requires significant, objective justification. This would have been the intellectual backdrop against which the Framers understood the words "judicial power."[57]

C. Modern Doctrine

Contemporary case-law evinces two basic approaches to constitutional stare decisis which are best understood through the lens of Professor Akhil Amar's two camps of Constitutionalists: doctrinalists and documentarians.[58] Doctrinalists privilege Supreme Court doctrine over the text, history, and structure of the Constitution itself.[59] Documentarians on the other hand, start with the document.[60] In terms of stare decisis doctrine, a strict doctrinalist would be inclined to a strong view of precedent, which would demand a justification far exceeding mere error to overrule prior case-law. On the other hand, a strict documentarian would not be inclined to defer to precedent at all, except insofar as they find its reasoning persuasive as to the text, history, and structure of the document. Neither approach in its strictest form has ever been followed by the Court: while mere error has been sufficient in the past to overrule precedent,[61] the Court has consistently described stare decisis as an important principle in constitutional adjudication.[62] As Professor Amar notes, "we are all documentarians; we are all

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[57] U.S. CONST. art. III, § 1.

[58] Akhil Reed Amar, *The Supreme Court 1999 Term. Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 82.

[62] *See, e.g.*, Moragne v. State Marine Lines, 398 U.S. 375, 403 (1970) ("Very weighty considerations underlie the principle that courts should not lightly overrule past decisions"); U.S. v. Robinson, 414 U.S. 218, 230 (1973) ("Virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta. We would not, therefore, be foreclosed by principles of stare decisis from further examination [of our precedent]."); Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) ("Generally, the principle of stare decisis, and the interests that it serves…counsel strongly against reconsideration of our precedent."); Citizens United v. FEC, 558 U.S. 310, 362 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."); Gamble v. U.S., 139 S. Ct. 1960, 1969 (2019) ("even in constitutional cases, a departure from precedent 'demands special justification.'") (quoting Arizona

doctrinalists."[63]

1. The Doctrinalist Approach

Planned Parenthood v. Casey is often cited as the first time that the Supreme Court has adopted a strong view of precedent[64] that requires "some special reason over and above the belief that a prior case was wrongly decided" in order to overrule it.[65] The requirement of a justification beyond mere error in order to overrule has been refined in later abortion cases and extended to other contexts.[66] This extra requirement is usually characterized as a prudential consideration.[67] In *Casey* itself, the Court indicated that this rule originates in a need to preserve the Court's legitimacy in certain cases.[68]

Specifically, the Casey court identified two circumstances in which the Court as an institution could be at serious risk of losing such a degree of legitimacy in the eyes of the American public that its identity and status would be genuinely threatened: 1) when overrulings occur too frequently and 2) when the Court "decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases" where "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[69]

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v. Rumsey, 467 U.S. 203, 212 (1984)). It should be noted that this list includes only cases in which stare decisis appears in the majority opinion. Most of the time, discussion of stare decisis will be found in concurring or dissenting opinions.

[63] Amar, *The Supreme Court*, *supra* note 58, at 27.

[64] *See* Vikram David Amar, *How* Allen v. Cooper *Breaks Important New (if Dubious) Ground on Stare Decisis*. Verdict, JUSTIA (Apr. 10, 2020), https://verdict.justia.com/2020/04/10/how-allen-v-cooper-breaks-important-new-if-dubious-ground-on-stare-decisis.

[65] Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992).

[66] Allen v. Cooper, 140 S. Ct. 994, 1003 (2020) (congressional abrogation of state sovereign immunity).

[67] Casey, 505 U.S. at 854.

[68] *Id.* at 863-66.

[69] *Id.* at 866-67.

2. The Documentarian Approach

Under the documentarian approach, mere error must always be a sufficient reason to overrule prior constitutional decisions, since the document itself is supreme over the Court's constructions of it.[70] The Court's jurisprudence has historically been closer to the documentarian approach.[71] Indeed, the Court has repeatedly noted that stare decisis is "not an inexorable command"[72] and that it is at its weakest when evaluating constitutional precedent.[73]

II. PROPOSING A WAY FORWARD

The Supreme Court, in determining whether to overrule its past constitutional precedent, should engage in a three-step inquiry. First, the Court should categorize the precedent at issue as robust, persuasive, or unstable considering the strength of the reasoning in the case, the degree to which the Justices had split along ideological lines in deciding the case,[74] and, to some extent, the public reception of the judgement. Second, the Court should consider whether special factors counsel for especially strong adherence to or rejection of the precedent at issue. These should include 1) reliance interests, 2) whether and to what extent the American public has ratified the precedent, 3) the number, quality, and workability of subsequent cases in the same line, and 4) any other circumstances which may compel action one way or the other. Third, the Court should

[70] Amar, *The Supreme Court*, *supra* note 58, at 26.

[71] *See* AMAR, *supra* note 10, at 235 (suggesting the Casey view was "not well established in pre-Casey case law," and noting that "a survey of earlier doctrine reveals at least seven twentieth-century overrulings based simply on the belief that the prior case was wrongly decided…if read broadly, Casey's dictum about precedent was virtually un-precedented, and indeed contrary to precedent.").

[72] *E.g.* Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020); Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[73] *E.g.* Agostini v. Felton, 521 U.S. 203, 235 (1997).

[74] I recognize that there is some danger in overemphasizing the outcome of a Justice's vote, rather than the reasoning they employ to arrive at it. *See* Frank Cross & James Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 409-10 (2010); *Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1909 (2009); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 98 (2002). However, such an inquiry is important when considering whether the Court should adhere to prior precedent or not, since it presents evidence of how conclusively the issue squarely presented in the case has been settled.

determine whether the precedent is clearly erroneous in light of all the factors considered, and if it is, it should overrule it.

Some factors in this test may overlap or be counted multiple times. For example, while clearly distinguishable, reliance interests and the American public's ratification of prior precedent are closely linked,[75] and judges should consider ratification when evaluating the status and quality of a case as well as independently as a factor counseling adherence or rejection of precedent.[76] Such redundancy is, at best, desirable in order to effectuate the dual policies of consistency and quality of adjudicatory outcomes,[77] and, at worst, inevitable given the complexity of the role of precedent in judicial activity.[78]

The adoption of this test, or one like it, would improve stare decisis doctrine and benefit the Court for a few reasons. First, it provides a consistent framework for adjudicating stare decisis issues in high-profile contexts. Regularly applying such a framework would protect the Court's legitimacy by putting the American public on notice of how the Court will decide whether to overrule a case in a principled way rather than unevenly applying rules which may favor one or another political group.[79] Second, the combination of a rules-based threshold with secondary prudential factors allows the Court to remain sufficiently flexible while ensuring that no precedent is overruled unless a majority of the Justices agree about its erroneousness and

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[75] WILLIAM O. DOUGLAS, STARE DECISIS 8-10 (1949).

[76] For example, ratification by the American citizenry can effectively ratify a decision which could have been considered erroneous at the time it was made. *See* AMAR, *supra* note 10, at 238-39. More broadly, because of the American system of popular sovereignty, all federal power is mediated by the American people. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 ch. 15 (1969). Justices construe the Constitution, but only as agents of the American people. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1433-37 (1987).

[77] See generally, by way of analogy, Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). See also F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635 (2016), for a more general discussion of the costs and benefits of doctrinal redundancy broadly.

[78] *See generally* DUXBURY, *supra* note 13.

[79] RICHARD FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 168-70 (2018); *See* Paul Mishkin, *Prophecy, Realism and the Supreme Court: The Development of Institutional Unity*, 40 AM. BAR ASS'N J. 680, 725-26 (1954).

about the standard by which erroneousness should be judged.[80]

While it is true that the Constitution "shall be the supreme Law of the Land," and that "all…judicial Officers…shall be bound by Oath or Affirmation, to support this Constitution,"[81] it is also true that "It is emphatically the province and duty of the judicial department to say what the law is,"[82] and that "No man can doubt or deny, that the power to construe the constitution is a judicial power."[83] While the Framers may not have understood the doctrine of stare decisis in the same way that we do today, they did understand Supreme Court precedent as a source of binding legal rules[84] and they did imbue the Supreme Court with the final authority to decisively construe and interpret the Constitution.[85]

While, as Amar notes, "If the justices generally felt free (or obliged!) to follow clearly erroneous case law concerning the core meaning of the Constitution, then the foundational document might ultimately be wholly eclipsed,"[86] there is a difference between voting to overrule precedent based on a Justice's subjective feeling that the precedent was wrongly decided and voting based on analysis of whether the precedent is "clearly erroneous" as an objective standard. The test that I have outlined specifies an objective standard, such that if a Justice feels personally that a precedent was wrongly decided but concludes that reasonable minds could differ on the point, then they should vote to sustain the precedent. This accords with

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[80] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 199-210 (1962).
[81] U.S. CONST. art. VI, § 3.
[82] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[83] STORY, *supra* note 53, at § 378.
[84] THE FEDERALIST NO. 78 (Alexander Hamilton).
[85] To be sure, the Founding generation did not view the Court as the preeminent, exalted source of constitutional interpretation that it is today. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 207-14 (2005). However, the Court's current status has been reenforced by nearly two centuries of American experience, culture, and doctrine. *Id.* at 217-18.; *See* James Wilson, *Introductory Lecture: Of the Study of the Law in the United States*, in 1 COLLECTED WORKS OF JAMES WILSON (2007) ("the sovereign power reside[es] in the people; they may change their constitution and government whenever they please").
[86] AMAR, AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 10, at 237.

the Justices' oaths to the Constitution as well as with the notion of "judicial power" as the Framers understood it and as it was expounded by Blackstone, Hamilton, and Story.[87]

CONCLUSION

The Supreme Court has consistently failed to develop a principled framework for applying stare decisis. Sometimes the doctrine goes totally unmentioned when the Court overrules constitutional precedent, while other times it represents a powerful force which intractably binds the Justices' votes. High profile decisions whether to overrule significant precedents will always undermine the Court's preeminent place in American culture and constitutional construction unless the Court articulates and begins consistently applying an impartial, comprehensive, and comprehendible stare decisis framework.

[87] Most importantly, each repeatedly affirmed that precedent should not be overruled on the basis of a judge's personal sentiments, nor should it be overruled unless it is clearly erroneous. *See infra* Section I.B.

Cameron F. Wallace

206 West 96th St. Apt. 2C, New York, NY 10025 | 318.840.3253 | cfw2127@columbia.edu

Writing Sample

The writing sample below is my portion of the argument section of a brief submitted as part of the 2022-23 Harlan Fiske Stone Moot Court Competition. While I collaborated with a partner on other sections of the brief, the part of the argument section below was solely my own work. While it has not been edited by anyone else, I did revise the argument section in preparation for semifinals, including incorporating some general feedback from judges after qualifying rounds. The question presented was whether an individual who was convicted in federal court of a violent offense could be designated a career offender under section 4B1.1 of the U.S. Sentencing Guidelines based on two prior state law convictions for possession with intent to distribute marijuana. The prior convictions occurred in 2012 and 2014 in South Dakota.

ARGUMENT

[Original Part I, my partner's issue, omitted.]

I. APPELLANT MAY BE DESIGNATED A CAREER OFFENDER UNDER THE FEDERAL SENTENCING GUIDELINES BECAUSE HIS PRIOR CONVICTIONS UNDER SOUTH DAKOTA LAW QUALIFY AS CONTROLLED SUBSTANCE OFFENSES.

Appellant's prior convictions for distribution or possession with intent to distribute marijuana under South Dakota law categorically qualify as controlled substance offenses under the United States Sentencing Guidelines because the definition of "controlled substance" in the Guidelines encompasses the definition of "marijuana" under South Dakota law, regardless of whether the definition in the Guidelines incorporates state law.

A. Standard of Review

The question of whether a prior offense "qualifies either as a crime of violence or as a controlled substance offense [under § 4B1.1] is a legal determination" which this court reviews *de novo*. *United States v. Williams*, 762 F. App'x 278, 280 (6th Cir. 2019).

B. Appellant's prior marijuana offenses under South Dakota law categorically qualify as controlled substance offenses for the purposes of the Guidelines.

In interpreting the career offender provision of the United States Sentencing Guidelines (the "Guidelines"), this Court should incorporate state law into the definition of the term "controlled substance" by adopting a generic, plain meaning definition pursuant to the principles of the categorical approach. Because Appellant was convicted under a statute regulating the possession or sale of a narcotic substance, Appellant's prior convictions categorically qualify under this approach. Alternatively, even if federal law governs the definition of "controlled substance" under the Guidelines, South Dakota's definition of marijuana was narrower than the federal government's definition, so the elements of a conviction under S.D. Codified Laws § 22-

42-7 are still encompassed within the generic federal definition of "controlled substance offense."

Under the Guidelines, a "defendant is a career offender if," among other things, "the defendant has at least two prior felony convictions of…a controlled substance offense." U.S. Sent'g Guidelines Manual § 4B1.1(a) (U.S. Sent'g Comm'n 2021) . The Guidelines define a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the…distribution…of a controlled substance…or the possession of a controlled substance…with intent to…distribute." *Id.* § 4B1.2(b).

In determining whether a prior offense under state law qualifies as a controlled substance offense for the purposes of § 4B1.1(a), this Court has adopted the "categorical approach," which looks to the statutory elements of the criminalized conduct, rather than the defendant's actual conduct. *United States v. Clark*, 46 F.4th 404, 407-08 (6th Cir. 2022). Under the categorical approach, the Court must first examine the elements of the generic offense outlined in the Guidelines, then compare them with the least culpable elements of the state offense at issue. *United States v. Jackson*, 995 F.3d 476, 479 (6th Cir. 2021). If the state offense is as broad as or narrower than the generic offenses under the Guidelines, then the offense categorically qualifies as a predicate offense. *Id.*

Here, the District Court correctly found that Appellant's prior convictions under South Dakota law qualify as controlled substance offenses for the purposes of the Guidelines. (R. at 44-45.) As an initial matter, the generic conduct elements of a controlled substance offense under the Guidelines encompass the least culpable conduct elements of a marijuana offense under the statute which the Appellant was convicted of violating. *Compare* U.S. Sent'g

Guidelines Manual § 4B1.2(b) (U.S. Sent'g Comm'n 2021) ("the…distribution…or the possession…with intent to…distribute") *with* S.D. Codified Laws § 22-42-7 (2022) ("The distribution, or possession with intent to distribute"). Appellant did not challenge this aspect of the presentence investigation report's findings in the District Court below.

The only issue for this Court to decide is whether, at the time of Appellant's prior convictions, the definition of "controlled substance" under the Guidelines included the definition of marijuana under S.D. Codified Laws § 22-42-7. First, pursuant to the categorical approach, this Court should interpret the term "controlled substance" within the career offender provision of the Guidelines to include substances regulated solely by the states by giving the term a generic definition. This approach conforms to this Court's interpretation in *Smith* and *Sheffey*, where it held that "[t]here is 'no requirement that the particular controlled substance underlying a state conviction also be controlled by the federal government[,]'" *United States v. Sheffey*, 818 F. App'x 513, 520 (6th Cir. 2020) (quoting *United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017)). Under this approach, S.D. Codified Laws § 22-42-7 categorically qualifies as a predicate offense because South Dakota regulated marijuana as a controlled substance, even if it did not use that terminology. Second, even if this Court interprets the term "controlled substance" to mean only those substances listed on the federal schedules, S.D. Codified Laws § 22-42-7 still categorically qualifies as a predicate offense because the definition of "marijuana" for purposes of the statute was as broad as or narrower than the definition under federal law at the time of Appellant's prior convictions.

1. The text, purpose, and history of the Guidelines demonstrate that the definition of "controlled substance" in the career offender provision extends well beyond the scope of the federal Controlled Substances Act.

As this Court held in *Smith* and *Sheffey*, the text, purpose, and history of the Guidelines clearly demonstrate that the term "controlled substance" is defined broadly in § 4B1.2(b), and both Congress and the Sentencing Commission intended for that definition to incorporate offenses for drugs regulated solely by state law.

While the Guidelines do not define the term "controlled substance," they also do not cross-reference the definition in the Controlled Substance Act. The Sentencing Commission knows how to cross-reference a definition when that is their intent; it has done it elsewhere in the Guidelines, including elsewhere in § 4B1.1. *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) ("There is no cross-reference to the Controlled Substance Act in § 4B1.2(b), like the cross-references to 26 U.S.C. § 5845(a) and 18 U.S.C. § 841(c) in the definition of the term 'crime of violence' in § 4B1.2(a)(2)."); *see also United States v. Ruth*, 966 F.3d 642, 652 (7th Cir. 2020) (citations omitted) ("Elsewhere, § 2D1.1 of the Guidelines expressly provides that it applies to 'counterfeit' substances, which are defined in 21 U.S.C. § 802, and tells us that 'analogue,' for purposes of this guideline, has the meaning given the term 'controlled substance analogue' in 21 U.S.C. § 802(32)."); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) ("Congress's choice to include a cross-reference to one but not the other…strongly suggests it acted 'intentionally and purposefully in the disparate' decisions"). Absent a cross-reference, there is no textual basis to link the definition of controlled substance in § 4B1.2(b) to the Controlled Substance Act. *Cf. Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574-75 (2007) (noting that a term may have different definitions when it is used multiple times "in the same statute or even in the same section," even where "the terms share a common statutory definition").

A "controlled substance offense" is "an offense under federal or state law." That phrase alone clearly demonstrates that the Guidelines contemplate predicate offenses which are violations under state law but not federal law. *See Henderson*, 11 F.4th at 718-19 ("there is no textual basis to graft a federal law limitation onto a career-offender guideline that…would defeat the Sentencing Commission's obvious intent…to include prior convictions for controlled substance offenses 'under . . . state law'"). Additionally, it would contravene Congressional intention: the Commission's enabling statute directs it to "assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant…has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions." 28 U.S.C. § 994(i)(1).

Additionally, the Sentencing Commission's decision to remove cross-references to the Controlled Substance Act in the legislative history of the definition of "controlled substance offense" should be read as affirmative evidence of intent not to tie the definition of controlled substance to federal law. Initially, the definition of "controlled substance offense" in § 4B1.2 read, "an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses." U.S. Sent'g Guidelines Manual § 4B1.2(2) (U.S. Sent'g Comm'n 1987). "Shortly thereafter, the Commission amended the definition to what is substantially, and substantively, its current form, without any cross-references." *Ruth*, 966 F.3d at 652; *see United States v. Thomas*, 939 F.3d 1121, 1129 (10th Cir. 2019) ("It is not as if it had never occurred to the Sentencing Commission to add the statutory definition as a cross reference. The omission of the cross-reference in § 4B1.2 only two years after it was added in § 2D1.1 appears to have been informed and intentional.").

Appellants may argue that the Sixth Circuit has already repudiated its unreported decisions in *Smith* and *Sheffey* by elsewhere defining "controlled substance" under the Guidelines according to federal law. However, there is no contradiction between referencing the federal definition where it is clearly applicable and looking to state law where it would be more appropriate. *See United States v. Williams*, 850 F. App'x 393, 397 (6th Cir. 2021) (pointing out potential intra-circuit split but wondering "if one actually exists"). The Sixth Circuit has never held that the meaning of "controlled substance" under the Guidelines is exclusively controlled by federal law. *See Ruth*, 966 F.3d at 654 (noting that, despite the apparent intra-circuit split, the Sixth Circuit has "continued to embrace *Smith*'s reasoning and held that" the definition is not limited to federal violations).

2. Defining "controlled substance" by its plain meaning comports with the requirements of the categorical approach outlined in *Taylor* and the principle announced in *Jerome*.

To the extent that Appellants rely on policy considerations such as national uniformity in sentencing, such arguments are misplaced. First, defining "controlled substance" according to its plain meaning and incorporating state law pursuant to that definition does not produce a significant disruption in national uniformity; indeed, this was exactly the insight which drove the Supreme Court in *Taylor* to create the categorical approach. Second, this Court must begin with the language of the Guidelines themselves. If the Sentencing Commission has elected to forgo national uniformity in sentencing enhancements based on controlled substance offenses in favor of jurisdictional differences; that is its prerogative. Third, the presumption announced in *Jerome* that the application of federal law should ordinarily not depend on state law do not apply in this context.

In *Taylor*, the Supreme Court considered how to define the word "burglary" in the context of a federal statutory sentence enhancement. 495 U.S. 575, 577-78 (1990). National uniformity was a major concern because wholesale incorporation of state law definitions, without any mechanism for mediating the vast differences in local terminologies, would have produced an unworkable and hopelessly confusing system whereby criminal statutes which used different terminology in different states to regulate roughly the same conduct in the same ways would be treated completely differently. *Id.*

To solve this problem, the Court decided that the word "burglary" should be given a generic definition distinct from specific state statutory definitions and the common law definition. *Id.* at 598-601. State law would then be incorporated by cross-referencing the substance of the state statute at issue with the generic definition. *Id.* This would allow the federal statute to incorporate state law while minimizing impacts on national uniformity and ensuring that all state statutes of similar categories would be treated similarly. This is exactly how the career offender provision of the Guidelines was intended to work: a court should not ignore state law by defining the term "controlled substance" exclusively according to federal law, but the enquiry also cannot stop at the terminology used in state statutes itself. Pursuant to the categorical approach, whether a state statute qualifies as a controlled substance offense depends on whether it is an offense concerning a substance which is a "controlled substance" according to the plain meaning of the term.

Even if there are national uniformity concerns with this approach, "[b]ecause states are primarily responsible for criminal law enforcement, there is no pressing need for national uniformity in the sentencing enhancement context, and it is not surprising that the courts of appeals interpreting the Sentencing Guidelines have incorporated variations in state punishments

for drug offenses." *Smith*, 681 F. App'x at 490 (quoting *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 913-14 (9th Cir. 2004)).

Regardless, the Sentencing Commission has made the considered decision to promulgate Guidelines which incorporate state law definitions of the term "controlled substance" for the purposes of determining career offender status, pursuant in part to Congress's directive in 28 U.S.C. § 944(i)(1). Where the Commission has clearly signaled its intentions, there is no room for the court to consider extraneous policy considerations. *See Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617, 629 (2018) (brackets in original) ("[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted."). "In crafting the federal sentencing Guidelines…Congress was well aware of the significant variations that existed in state criminal law," and decided that those differences should be preserved for the purposes of sentencing enhancement determinations. *United States v. Whitfield*, 726 F. App'x 373, 376 (6th Cir. 2018).

Additionally, the notion that "federal law does not depend on state law unless Congress plainly indicates otherwise," *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018), also called the *Jerome* presumption, is simply not applicable here. Even overlooking the plain indication by Congress here, the decision in *Jerome* dealt with the narrow context of interpreting definitions of federal crimes, which involves substantially different policy considerations than those that go into interpreting the Guidelines. *See Henderson*, 11 F.4th at 719 ("the Supreme Court has rarely cited Jerome and never to our knowledge in a Guidelines case").

In *Jerome*, the Court noted that when the federal government defines a chargeable criminal offense which builds upon or duplicates state law offenses, it must be mindful that "the administration of criminal justice under our federal system has [traditionally] rested with the states," and that "the double jeopardy provision of the Fifth Amendment does not stand as a bar

to federal prosecution though a state conviction based on the same acts has already been obtained." *Jerome v. United States*, 318 U.S. 101, 105 (1943). Therefore, if the federal offense incorporates state law definitions, an individual could theoretically be prosecuted and convicted twice for the exact same crime defined in the exact same statute in apparent contravention of the Fifth Amendment. *See id.* Additionally, where federal law defines a crime by reference to state law, the "federal law…depend[s] on state law" in a very literal sense. The federal criminal statute literally cannot be applied unless its state law elements are identified, alleged, and proved beyond a reasonable doubt.

There are no parallel considerations here. The Guidelines only become operative once criminal convictions have already been obtained; there is no risk of double jeopardy in broadly defining predicate offenses. Similarly, incorporating state law into the definition of controlled substance for the purposes of the Guidelines does not make the application of the Guidelines "depend on state law;" the Guidelines are always applied. The question of interpretation here goes only to the method of application.

3. While South Dakota employs idiomatic terminology, it regulates marijuana as a controlled substance for the purposes of the Guidelines.

Marijuana was a controlled substance under South Dakota law at the time of Appellant's convictions; Appellant's arguments to the contrary disingenuously capitalize on a purely semantic idiosyncrasy in the state's statutory scheme.

"A controlled substance is generally understood to be 'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law.'" *Ruth*, 966 F.3d at 654 (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987)); *see also* Black's Law Dictionary 378-79 (9th ed. 2009)

(defining controlled substance as "Any type of drug whose possession and use is regulated by law, including a narcotic, a stimulant, or a hallucinogen."). Under South Dakota law, possession and use of marijuana were restricted by law at the time of Appellant's convictions. *See, e.g.*, S.D. Codified Laws §§ 22-42-1(7), 22-42-6, 22-42-7 (2014). It was therefore, *per se*, a controlled substance.

Additionally, while South Dakota's statutory scheme appears to create a linguistic divide between "controlled substance" and "marijuana," each term, along with related terminology, appear together throughout South Dakota's statutory scheme for drug-related offenses, and function the same way. *See State v. Stahl*, 619 N.W.2d 870, 872 (S.D. 2000) (noting severe sentence justified because "in [defendant's] presentence report he admitted past use of illegal substances, specifically marijuana, methamphetamine and LSD."); S.D. Codified Laws § 22-42-1(3) (2014) (to "deliver" is to transfer a "controlled drug, substance, or marijuana"); *Id.* § 22-42-1(5) (to "distribute" is to deliver a "controlled drug, substance, or marijuana"); *Id.* § 22-42-21 ("It is not a defense…regarding distribution of a controlled substance or marijuana to a minor that the defendant did not know that the recipient was a minor").

Moreover, S.D. Codified Laws § 22-42-7 clearly falls squarely into the category of crimes which Congress intended for the Sentencing Commission to consider as predicate offenses indicative of career criminalism or recidivism and which the Commission intended to reach in § 4B.1. *See United States v. Beasley*, 12 F.3d 280, 287 (1st Cir. 1993) (brackets in original) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3358) ("Congress wrote that the provision's objective was to ensure that 'substantial prison terms [are] imposed on…repeat drug traffickers'"); *United States v. Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989) ("[Appellant] is a repeat drug trafficker…we can discern no

sensible reason why Congress would view [his] conduct with any less opprobrium because of the fortuity…that he was prosecuted under analogous state statutes [rather than federal statutes]").

4. In the alternative, Appellant's convictions under S.D. Codified Laws § 22-42-7 categorically qualify as controlled substance offenses because South Dakota's definition of marijuana was narrower than that of the federal government.

A conviction for possession with intent to distribute marijuana under § 22-42-7 categorically qualifies as a predicate offense under the Guidelines even if federal law defines "controlled substance" because, at the time of Appellant's prior convictions, South Dakota's definition of marijuana was as broad as or narrower than the federal government's definition.

If federal law governs the definition of "controlled substance" for the purposes of the Guidelines, this Court must compare the federal definition of "marijuana" effective at the time of Appellant's prior convictions to South Dakota's definition at that time and "ask whether there is any daylight between the two." *Jackson*, 995 F.3d at 480; *see Clark*, 46 F.4th at 408. "We're not looking for a literal match…As long as 'the elements of the [state] offense are of the type that would justify its inclusion within the definition of a controlled-substance offense[,]' the offense is covered." *United States v. Garth*, 965 F.3d 493, 496 (6th Cir. 2020) (brackets in original) (quoting *United States v. Woodruff*, 735 F.3d 445, 449 (6th Cir. 2013)).

At the time of Appellant's convictions, federal law defined marijuana as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C. § 802(16) (2014) (amended 2018). South Dakota defined marijuana as "all parts of any plant of the genus cannabis, whether growing or not, in its natural and unaltered state, except for drying or curing and crushing or crumbling. The term includes an altered state of marijuana absorbed into the human body." S.D. Codified Laws § 22-

42-1(7) (2014) (amended 2020). The federal definition excluded "mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." 21 U.S.C. § 802(16) (2014) (amended 2018). The South Dakota definition excluded "fiber produced from the mature stalks of such plant, or oil or cake made from the seeds of such plant." S.D. Codified Laws § 22-42-1(7) (2014) (amended 2020).

The South Dakota Supreme Court has taken notice of the similarity between the two. *See State v. Murphy*, 89 S.D. 486, 491 (1975) (noting "This statutory definition is quite similar to the definition of marihuana provided in 21 U.S.C.A. § 802(15)," and using federal court commentary on the federal definition of marijuana to interpret South Dakota's definition). While both the state and federal definitions have changed since *Murphy*, they are still substantially the same and have changed in parallel ways. There are only two functional differences between the two definitions. First, the federal definition includes altered forms of the plant while South Dakota includes only the plant "in its natural and unaltered state," and second, the federal definition excludes "mature stalks of such plant" and any products made from such stalks, while South Dakota excludes only "fiber produced from the mature stalks." The first difference makes the state definition narrower than the federal definition. The second difference is insufficiently material to conclude that § 22-42-7 is overbroad.

Here, the federal definition and the South Dakota definition are practically the same: the language excluding "mature stalks" from the federal definition was originally intended to exclude hemp, but those exclusions were completely ineffectual for all practical purposes until the passage of the 2018 Farm Bill, which legalized hemp by adding an additional passage cross-

referencing the federal definition of hemp. *See* Aaron Roussell, *The Forensic Identification of Marijuana: Suspicion, Moral Danger, and the Creation of Non-Psychoactive THC,* 22 Alb. L.J. Sci. & Tech. 103, 122 (2012) ("the second sentence of the [21 U.S.C. 802(16)] excludes the parts of the plant encouraged in hemp cultivation…As we have seen, however, scientists concerned with issues of the law have demonstrated that, taxonomically, they are the same plant."); Nicole M. Keller, *The Legalization of Industrial Hemp and What it Could Mean For Indiana's Biofuel Industry*, 23 Ind. Int'l & Comp. L. Rev. 555, 562 (2012) ("It is clear that Congress tried to exclude industrial hemp from the legislation (i.e. 'but shall not include the mature stalks of such plant'), but for practical purposes there is no way for a farmer to produce the 'mature stalks of such plant' without growing 'the seeds thereof.'). Put another way, the attempted exclusion of "mature stalks" in the federal definition of marijuana failed and, in fact, was not operative language. *See Molitor v. City of Scranton*, No. 3:20-1266, 2021 U.S. Dist. LEXIS 164478, at *13 (M.D. Pa. Aug. 31, 2021) ("Hemp and hemp-based CBD, like marijuana, were generally considered illegal substances under the federal Controlled Substance Act until passage of the Agriculture Improvement Act of 2018 (the '2018 Farm Bill')").

Even if the language excluding mature stalks was meaningful, "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires…a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Generally, to establish a realistic probability, a defendant "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* The burden is on the Appellant to establish realistic probability. *United States v. Paulk*, 46 F.4th 399, 404 (6th Cir. 2022). Here, there is no

realistic probability that § 22-42-7 would reach conduct beyond that proscribed by the Guidelines: there is no commercial value in the "mature stalks" of the marijuana plant beyond the plant's psychoactive properties or its uses as industrial hemp, so a defendant would never be charged with distribution or possession with intent to distribute *only* the "mature stalks" of the marijuana plant.

There are only two other apparent differences between the definitions: first, South Dakota's definition includes "any plant of the genus cannabis" while only "Cannabis sativa L." appears in the text of the Controlled Substance Act, and second, South Dakota's definition includes "an altered state of marijuana absorbed into the human body" while the federal definition does not. In reality, however, the first was a drafting error on the part of Congress, and courts read the federal definition to mean "any plant of the genus cannabis," or, in the Sixth Circuit's formulation, "all forms of marijuana." *United States v. Dinapoli*, 519 F.2d 104, 106-07 (6th Cir. 1975); *see also United States v. Turbyfill*, No. 89-1876, 1990 U.S. App. LEXIS 15540, at *4 (6th Cir. Aug. 31, 1990) (brackets in original) (citations omitted) (quoting *Dinapoli*, 519 F.2d at 106) ("This court, however, has held that the 'Congressional prohibition [against marijuana] was intended to apply to all forms of marijuana.' Each circuit which has been confronted with this issue has held that marijuana includes all types of marijuana"); *United States v. Sanapaw*, 366 F.3d 492, 495 (7th Cir. 2004) ("This Court, and every other court that has decided this issue, has concluded that it would be manifestly unreasonable to interpret the Act to apply solely to Cannabis sativa L.").

The second difference is simply not relevant here. A person cannot be convicted under S.D. Codified Laws § 22-42-7 of distribution or possession with intent to distribute marijuana in "an altered state…absorbed into the human body" because if marijuana has already been

"altered" (to wit, combusted or cooked) and "absorbed into the human body" (to wit, smoked or eaten) it cannot be sold or possessed with intent to sell. The burden would be on Appellants to show that the South Dakota courts had used the statute at issue "in the special (nongeneric) manner" of prosecuting conduct falling under that portion of the definition.

While Appellant may argue that the definition of marijuana in § 22-42-1(7) effective at the time of Appellant's prior convictions is overbroad with respect to the federal definition of marijuana in effect today, this Court has explicitly adopted a "time-of-conviction rule." *Clark,* 46 F.4th at 408. Thus, "courts must define the term 'controlled substance offense' in the Guidelines with reference to the law in place at the time of the prior conviction at issue." *Id.* at 415. Even aside from the textual, purposive, and policy arguments militating in favor of this conclusion, this Court is bound to follow its prior precedential decision in *Clark.* 6th Cir. R. 32.1(b) (binding effect of published decisions) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc."); *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)) ("A published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision'"). Moreover, there has never been any contrary precedential authority on this issue in this circuit since *Williams* was unreported and therefore had no binding effect on this Court or any district court within this circuit. *Sheets v. Moore,* 97 F.3d 164, 167 (6th Cir. 1996) ("decisions [which] are unpublished…carry no precedential weight. They have no binding effect on anyone other than the parties to the action.").

Applicant Details

First Name	**Julia**
Last Name	**Wang**
Citizenship Status	**U. S. Citizen**
Email Address	**juliawang@berkeley.edu**
Address	**Address** Street **1516 Henry Street, Apt 4** City **Berkeley** State/Territory **California** Zip **94709** Country **United States**
Contact Phone Number	**4083962943**

Applicant Education

BA/BS From	**Rice University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**California Law Review** **Asian American Law Journal** **Berkeley Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Linos, Katerina
klinos@law.berkeley.edu
Reding, Ann
areding@law.berkeley.edu
5106421831
Scharf, James
James.Scharf114@gmail.com
(831) 251-1924

References

Vinita Kailasanath
Partner, Freshfields Bruckhaus Deringer
vinita.kailasanath@freshfields.com
(650) 618-9250

Nicholas A. Caselli
Counsel, Freshfields Bruckhaus Deringer
nicholas.caselli@freshfields.com
(212) 230-4628

Alice Armitage
Professor and Director of Applied Innovation, LexLab
armitagea@uchastings.edu
(310) 415-5325

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JULIA WANG

1516 Henry Street Apt. 4, Berkeley, CA 94709 • (408) 396-2943 • juliawang@berkeley.edu

June 26, 2023

The Honorable Stephanie Dawkins Davis
United States District Court
Eastern District of Michigan
Federal Building and United States Courthouse
600 Church Street, Room 125
Flint, MI 48502

Dear Judge Davis:

I am a rising 3L at the University of California, Berkeley, School of Law, where I am the Senior Executive Editor of the *California Law Review* and Editor-in-Chief of the *Asian American Law Journal*. I am writing to apply for a clerkship in your chambers for the 2024–2025 or 2025–2026 term. I intend to pursue a legal career in public service and would welcome the opportunity to learn from your experience not only as a judge but also as a former Assistant U.S. Attorney.

As an aspiring litigator, I have honed the skills that will make me an effective judicial clerk and future advocate, and I am eager to continue improving my abilities in your chambers. As a law clerk at the U.S. Attorney's Office, I strengthened my abilities to quickly understand unfamiliar areas of the law, write clear and concise legal arguments, and deliver error-free briefs on tight deadlines. During my 2L year, I served as a tutor for the Legal Research and Writing program and worked with other law students to develop their legal writing skills, further enhancing my own knowledge in the process.

Additionally, my teamwork skills, curiosity, and persistence will allow me to contribute meaningfully to your chambers. After researching education policy in China, migration policy in France, and automated vehicle policy with the U.S. Department of Transportation, I learned to express complex concepts for a broader audience and discovered that I thrive best in interdisciplinary settings. In the Peace Corps, I collaborated with my Macedonian co-teachers to develop student-centered practices while navigating a new language and cultural norms. These traits will help me adapt quickly to any new challenges that I encounter.

My resume, law school transcript, and writing samples are enclosed, and letters from Berkeley Law professors Ann Reding and Katerina Linos and former Assistant U.S. Attorney James Scharf will follow. I am happy to provide any additional information upon request. I hope to have an opportunity to discuss further the possibility of joining your chambers. Thank you for your time and consideration, and I look forward to hearing from you soon.

Sincerely,

Julia Wang

JULIA WANG

1516 Henry Street Apt. 4, Berkeley, CA 94709 • (408) 396-2943 • juliawang@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law • Berkeley, CA
J.D. Candidate, expected May 2024
Honors: First-Year Academic Distinction (Top 25%); Jurisprudence Award in Business Associations; Berkeley Law Dean's Fellowship; Miller Institute-American Society for International Law Student Fellowship
Activities: *Asian American Law Journal*, Editor-in-Chief; *California Law Review*, Senior Executive Editor; *Berkeley Journal of International Law*, Podcast Editor; Asian Pacific American Law Student Association, Dale Minami Public Interest Fellowship Chair; Legal Research and Writing Program, Tutor; Political and Election Empowerment Project, Student Leader; Women in Tech Law, Communications Director

Rice University • Houston, TX
B.A. in Art History & Economics (certificates in Civic Leadership & French), May 2019
Honors: Baker Residential College Service Award; Frank L. Berry, Jr. Award; Clyde Ferguson Bull Traveling Fellowship; Loewenstern Fellowship for Civic Research; McNair Center Prizes for Best Undergraduate Research & Best Published Article; Truman Scholarship Nominee
Activities: Baker Institute Student Forum, President; Baker Residential College Cabinet, Parliamentarian; Office of Academic Advising, Head Peer Academic Advisor; Rice Campanile Yearbook, Managing & Design Editor
Internships: United States Department of Transportation; Baker Institute for Public Policy; Collective Responsibility; Teach for America
Study Abroad: Institut d'études politiques de Paris, Reims, France (Spring 2018)

EXPERIENCE

Susman Godfrey LLP • Houston, TX — July 2023–Aug. 2023
Incoming Summer Associate

Freshfields Bruckhaus Deringer LLP • Washington, DC — May 2023–July 2023
Summer Associate
Researching legal issues in antitrust litigation, foreign judgment enforcement, and pro bono criminal appeal.

United States Attorney's Office, Northern District of California • San Jose, CA — Aug. 2022–Dec. 2022
Law Clerk, Civil Division
Wrote district court briefs about vicarious liability under the Federal Tort Claims Act (case settled), judicial review of agency action, *Bivens* claims (case dismissed), and sovereign immunity. Drafted Ninth Circuit brief in judicial immunity case. Wrote sections of mediation statement and settlement memo.

Freshfields Bruckhaus Deringer LLP • Redwood City, CA — May 2022–July 2022
Summer Associate & 1L Diversity Fellow
Researched legal issues in securities litigation and international arbitration. Drafted client guidance in data privacy, capital markets, and MedTech M&A. Assisted client with IP and compliance matters during secondment.

University of California College of the Law, San Francisco • San Francisco, CA — July 2020–July 2021
Project Lead, LexLab
Coordinated public legal hackathon, accelerator program, and regular panels on law and innovation. Assisted with courses: A2J, Design Thinking, and Homelessness; Legal Operations; and Building a Legal Tech Startup.

ADDITIONAL INFORMATION

Languages: Mandarin (fluent), French (advanced), Macedonian (intermediate)
Interests: Small business branding and design, jazz dance, crosswords, kombucha fermenting
Service: Immigration Institute of the Bay Area (Volunteer Case Assistant, 2021), Peace Corps North Macedonia (English Language Co-Teacher, 2019–2020)

Berkeley Law
University of California
Office of the Registrar

Julia Wang
Student ID: 3037350169
Admit Term: 2021 Fall

Printed: 2023-06-08 16:50

Academic Program History
Major: Law (JD)

Awards

Jurisprudence Award 2022 Fall: Business Associations

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Linda Krieger	5.0	5.0	HH
LAW	202.1A	Legal Research and Writing Ann Reding	3.0	3.0	CR
LAW	202F	Contracts Asad Rahim	4.0	4.0	H
LAW	230	Criminal Law Charles Weisselberg	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	201	Torts Talha Syed	4.0	4.0	P
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Ann Reding	2.0	2.0	HH
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	H
LAW	252.21	Antitrust&Technology Platforms Christopher Hockett	1.0	1.0	CR
LAW	261	International Law Katerina Linos	4.0	4.0	HH

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	31.0	31.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	222	Federal Courts Amanda Tyler	5.0	5.0	P
LAW	250	Business Associations Frank Partnoy	4.0	4.0	HH
LAW	295	Civ Field Placement Ethics Sem **Fulfills Either Prof. Resp. or Experiential** Susan Schechter Jessica Mark Cheryl Stevens	2.0	2.0	H
LAW	295.6A	Civil Field Placement **Units Count Toward Experiential Requirement** Susan Schechter	4.0	4.0	CR

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	46.0	46.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	223	Administrative Law Kenneth Bamberger	4.0	4.0	P
LAW	225	Legislation & Statutory Interp Jonathan Gould	3.0	3.0	H
LAW	241	Evidence Sean Farhang	4.0	4.0	P
LAW	261.17	International Organizations **Fulfills Writing Requirement** Katerina Linos	3.0	3.0	H
LAW	277.7	Art&Cultur Prop Law Carla Shapreau	1.0	1.0	CR
LAW	295.1G	Calif Law Review Amanda Tyler	1.0	1.0	CR

	Units	Law Units
Term Totals	16.0	16.0

Carol Rachwald, Registrar

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Berkeley Law
University of California
Office of the Registrar

Julia Wang
Student ID: 3037350169
Admit Term: 2021 Fall

Cumulative Totals	62.0	62.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	223.1	Election Law	3.0	3.0	
		Units Count Toward Race and Law Requirement			
		Abhay Aneja			
LAW	244.1	Adv Civ Pro:Complex Civil Lit	4.0	4.0	
		Andrew Bradt			
LAW	261.2	Intern. Litigation&Arbitration	3.0	3.0	
		Neil Popovic			
LAW	295.3J	McBaine Moot Court Competition	1.0	1.0	
		Units Count Toward Experiential Requirement			
		Gregory Washington			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	62.0	62.0

Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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May 19, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am delighted to recommend Julia Wang for a clerkship. She is an exceptionally strong Berkeley Law student, with extensive writing experience. She is the child of immigrants, the first lawyer in her family, with a great curiosity about the world writ large, and the world of law and business regulation in particular. A former peace corps volunteer, she is very constructive and organized and helps bring out the best on teams. I would hire her in a heartbeat.

I first had the pleasure to meet Julia in my international law class, where she was very dedicated, prepared and sharp. Unsurprisingly, Julia also did very well on the final exam in this large class. I then got to know Julia even better in my international organizations class, a small seminar with 15 students and intense reading, student participation, and writing requirements. Julia is quiet, constructive, and effective. She gets a lot done behind the scenes, and doesn't claim credit for it.

Through this class, I got to admire several qualities in Julia. One is that she is a very ambitious. She wrote a paper on intellectual property without much background in this field; she was interested in WIPO, the World Intellectual Property Organization, and just chose to do the needed research. Another is that she is an excellent analytical thinker and writer. Her article: "A new norm-maker on the IP-creating block: China's push to advance equity through WIPO" is innovative in that it shows China not resisting western norms but pushing new norms on heritage and equity in IP. A third, more subtle aspect of Julia's personality is her contribution to teams. For reasons having to do with topic selection, I paired Julia with a Chinese LLM student who also wrote on WIPO. At Berkeley we have Chinese LLM students of varying abilities; the student I paired Julia with I thought should not be in this writing-intensive seminar. I had previously tried to dissuade the LLM student from taking the seminar, because I worried about her linguistic weaknesses and many other commitments during the semester. That said, Julia and this other student jointly prepared excellent work. I have no doubt that Julia worked outside of class to make sure her teammate was well-prepared. Julia, of course, did not mention anything about this – but I was very impressed that Julia carried not only her own weight but that of a much weaker classmate.

Julia's CV and transcript are impressive, but I would nevertheless like to use this letter to put some elements in context. Let me start with her transcript: throughout, you will see Honors and High Honors grades. This is very unusual, because Berkeley Law has a strict curve, and only the top 10% of a class can earn High Honors in any course, with the next 30% eligible for Honors. Simply put, most Berkeley Law student transcripts look very different from Julia's, and are filled with Pass grades. Next, Julia has carefully chosen her courses to pick challenging ones, and ones that prepare her well for international law, business law, and litigation and arbitration. Some of these courses are more theoretical; others are very directly client-facing. Her mix of courses and her high performance across the board implies that she will be able to hit the ground running.

In addition, Julia devotes significant time to extracurricular projects that also help prepare her for this position. To start, she is an editor in the California Law Review, and an editor in the Berkeley Journal of International Law, and an editor in the Asian American Law Review. These are competitive, time-consuming positions that greatly help hone student writing skills. When I hire among Berkeley students, I always look for a student who has worked on a law review, as it is a great indicator that their writing will come to me in great shape, requiring little editing. It is rare to find Berkeley Law students that serve on two journals, let alone three journals, as Julia does, and that is an added signal of her ability to manage many competing obligations well. She is also heavily involved in advocacy projects.

Julia has worked for the US Attorney's office in the Northern District of California as an extern, writing briefs on immunity cases, vicarious liability under the Federal Tort Claims Acts, and Bivens claims. She has worked on securities litigation and international arbitration matters through summer law firm positions. I have no doubt that if hired, she would contribute greatly, quietly, and efficiently, and make all those around her shine.

I could not recommend Julia Wang more strongly. Please do not hesitate to contact me by email (klinos@berkeley.edu) or by phone (510-642-3646) if any further information would be of use.

Warm regards,

Katerina Linos, J.D./Ph.D.
Professor, Berkeley Law

May 18, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to enthusiastically recommend one of my former students and future tutors, Julia Wang, for a judicial clerkship. She has the intellectual abilities, legal research and writing skills, and the commitment to excellence that ensures she will be a top-notch clerk.

I had the pleasure of teaching Julia throughout her first year, initially in Legal Research and Writing (fall semester) and then in Written and Oral Advocacy (spring semester). In both classes, Julia was one of only nineteen students, which afforded me an opportunity to closely assess her aptitude and personality. Julia was very successful, and consistently produced sophisticated, polished, and professional work. Indeed, her final brief in Written and Oral Advocacy earned her a High Honors grade in her highly-competitive section. An experienced practicing attorney could have filed Julia's final brief with justifiable pride.

Julia's writing style is concise yet descriptive and exhibits a meticulous approach to her analysis. Over the year, Julia demonstrated complete proficiency in her ability to discern the critical language and concepts of our statutory and decisional authorities as well as a keen ability to communicate her understanding. In addition, Julia is an efficient and successful researcher. In both the fall and spring semesters, she quickly located the relevant cases for each of the problems we considered.

Julia is a motivated and conscientious student who possesses strong leadership skills and sound judgment. As a student, Julia came to my office hours with thoughtful questions, seeking critiques of her draft work. She showed herself to be coachable, quickly understanding and implementing my suggestions about how her work could improve. I have hired Julia to be one of my tutors next fall, and I know she will be fabulous in the role.

I urge you to consider Julia's application. She is well on her way to becoming an excellent lawyer and will make a superb law clerk. She is also a person who would brighten any office in which she works: she has a winning personality and a great attitude. I believe any judge would benefit not only from her legal skills but also her presence and perspective.

If I can be of any further assistance, I hope that you will not hesitate to contact me at areding@law.berkeley.edu or (510) 642-1831.

Sincerely,

Ann Marie Reding
Professor of Legal Writing
Legal Research, Analysis, and Writing Program
University of California, Berkeley School of Law

James A. Scharf
1400 Dolphin Drive
Aptos, California 95003
James.Scharf114@gmail.com
(831) 251-1924

May 25, 2023

Re: Julia Wang Recommendation Letter

Your Honor,

I was Julia's supervisor at the United States Attorney's Office, Northern District of California, Civil Division, San Jose Office, during the summer of 2022. I encouraged her to apply for a judicial clerkship because she was a stellar law clerk and will make an excellent judicial clerk.

I retired from the United States Attorney's Office on January 31, 2023 after sixteen years of public service. I served as Senior Litigation Counsel, the Civil Division Training Program Director, and the San Jose Office Law Clerk Supervisor. I also served as a Vice President of the State Bar of California in 2006 and 2007.

Julia made game-changing contributions on one of my most significant cases, *Park v. USA* (Case No. 5:21-cv-09639-EJD) in which a VA psychiatrist sexually abused one patient and sexually harassed two other patients. Liability was probable and the case had potential exposure of several million dollars or more. Julia researched and drafted key sections of a motion to dismiss, settlement memo, and mediation statement. Her work product helped me resolve this challenging case in its entirety for just one million dollars. Julia also researched and drafted a motion to dismiss and a reply brief in *Harris v. FBI* (Case No. 5:22-cv-05149-VKD) and drafted a Ninth Circuit Answering Brief in *Bruzzone v. McManis* (Case No. 22-16474).

Julia's research and writing skills are excellent. She worked quickly and efficiently, and I filed or used her work product with minimal edits. Her interpersonal skills are just as impressive. She is calm, confident, and extremely personable. I feel privileged that Julia served as one of my last law clerks. I am certain you and your staff will enjoy working with her as much as I did.

Please do not hesitate to call me should you require additional information about this exceptional applicant.

James A. Scharf

JULIA WANG

1516 Henry Street Apt. 4, Berkeley, CA 94709 • (408) 396-2943 • juliawang@berkeley.edu

WRITING SAMPLE

As a law clerk at the United States Attorney's Office for the Northern District of California, I wrote the attached reply in support of the defendant's motion to dismiss in a case in which a plaintiff brought *Bivens* claims against the federal government.

This brief is publicly filed in the United States District Court for the Northern District of California under docket number 5:22-cv-05149-VKD. I wrote this brief after having general conversations about the arguments herein with my supervisor. My supervisor reviewed it and made minor edits before filing. He has also granted me permission to use this brief as a writing sample. I am happy to provide additional writing samples upon request.

STEPHANIE M. HINDS (CABN 154284)
United States Attorney
MICHELLE LO (NYRN 4315163)
Chief, Civil Division
JAMES A. SCHARF (CABN 152171)
Assistant United States Attorney

U.S. Attorney's Office/Civil Division
150 Almaden Blvd., Ste. 900
San Jose, California 95113
Telephone: (415) 912-6370
FAX: (408)535-5081
James.scharf@usdoj.gov

Attorneys for Defendant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD HARRIS, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	CASE NO. 22-05149-VKD **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** Date: December 6, 2022 Time: 10:00 a.m. Place: Courtroom 2, 5th Floor, 280 South 1st Street, San Jose, CA 95113 Magistrate Judge: Virginia K. DeMarchi

I. INTRODUCTION

On September 9, 2022, Plaintiff Donald Harris sued Defendant Federal Bureau of Investigation for alleged violations of "constitutionally guaranteed rights and federal treaties." After Defendant moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiff filed an Opposition to Defendant's motion to dismiss on November 17, 2022.

Although Plaintiff's Opposition is well over the twenty-five pages permitted by Civil Local Rule 7-3(a), Plaintiff's Opposition further confirms the thesis of Defendant's motion to dismiss – Plaintiff's

allegations of a fantastical FBI conspiracy are inherently implausible and without merit. Indeed, Plaintiff acknowledges in his Opposition that his Complaint was deficient and that his allegations were vague and fantastical. The new facts in Plaintiff's Opposition, however, do not cure the defects identified by Defendant in its motion to dismiss. Plaintiff argues in his Opposition that the FBI caused Plaintiff's friends and co-workers to psychologically manipulate and torment him. However, Plaintiff states no facts to show that the FBI did so and cannot name even a single FBI agent involved in this alleged conspiracy. Nor does Plaintiff state any reason why the FBI would want to harm him.

In its motion to dismiss, Defendant argued that this Court lacks subject matter jurisdiction over Plaintiff's fantastical claims or, alternatively, that Plaintiff fails to state a claim upon which relief can be granted. Plaintiff's Opposition fails to address the merits of Defendant's arguments for dismissing the Complaint. For the reasons explained in its motion to dismiss and in this Reply, Defendant respectfully requests that the Court grant Defendant's motion to dismiss without leave to amend.

II. ARGUMENT

A. Plaintiff fails to address Defendant's legal arguments and thus concedes them.

In its motion to dismiss, Defendant argued (1) Plaintiff's Complaint is barred by sovereign immunity; (2) Plaintiff's fantastical and delusional claims are insufficient to invoke the subject-matter jurisdiction of the Court; (3) Plaintiff has failed to state plausible claims for relief; (4) Plaintiff's *Bivens* claims are untimely; (5) Plaintiff's *Bivens* claims should be dismissed in light of the Supreme Court's reasoning in *Abbasi*; and (6) Plaintiff's claims should be dismissed without leave to amend. Plaintiff largely ignores these arguments in his Opposition. Because Plaintiff fails to substantively address Defendant's arguments, he has conceded the merits of these arguments. *See, e.g.*, *Tyler v. Travelers Com. Ins. Co.*, 499 F.Supp.3d 693, 701 (N.D. Cal. 2020) ("As an initial matter, Plaintiff concedes these arguments by failing to address them in her opposition."); *Pecover v. Elec. Arts Inc.*, 633 F. Supp. 2d 976, 989 (N.D. Cal. 2009) ("[P]laintiffs have effectively conceded, by failing to address the issue in their opposition memorandum.").

B. Plaintiff's new facts do not plausibly show FBI involvement.

In his Opposition, Plaintiff details twenty-nine pages of events that allegedly occurred from May 2007 to September 2022. *See* Opp'n pp. 3-32. However, none of the new allegations plausibly show that the FBI conspired to harm him. Plaintiff asserts that finding "planted" condoms in his apartment, missing certain paperwork, and being seated next to a fellow Special Forces member on a flight during his military service somehow show evidence of the FBI's machinations against him. *Id.* ¶¶ 28, 30b, 33, 42. Plaintiff further contends that events like his realization that a specific day was not a payday like he had thought, a white car passing by his house three times, music playing from his neighbor's house, symptoms from "directed energy weapons," and delays in installations for his camper van somehow demonstrate that the FBI engaged in "offensive operations" to psychologically destabilize him. *Id.* ¶¶ 52, 53, 64, 76a, 81a-83, 92b, 93-93f, 98, 99c. These new allegations further confirm that Plaintiff's claims are paranoid, fantastical and implausible.

C. Plaintiff fails to state cognizable claims regarding violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Plaintiff does not state cognizable claims for relief because each of the constitutional rights that Plaintiff asserts are inapplicable to his claims. First, Plaintiff does not state a cognizable Fourth Amendment claim because he does not allege that he was subjected to an unreasonable search or seizure by the FBI. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . ."). The Fourth Amendment does not apply to any of the actions that Plaintiff alleges, such as "music being played that is coordinated with [Plaintiff's] actions, tampering with electronic devices, [and] use of [Plaintiff's] inner circle," because none of these constitutes a search or seizure. *See* Opp'n ¶ 101. Moreover, Plaintiff's assertion that "the FBI is intercepting [his] communications and surveilling [him] and using [his] statements said over the phone or [in his home]" to defame Plaintiff is implausible and conclusory. *See id.*

Similarly, Plaintiff does not state a cognizable due process claim under either the Fifth or Sixth Amendments because he does not allege that he was a defendant in a criminal proceeding. *See* U.S. CONST. amend. V (detailing procedures guaranteed to defendants in criminal proceedings); amend. VI

(outlining the rights of "the accused" "[i]n all criminal prosecutions"). As Plaintiff concedes, the FBI has not brought charges or accused Plaintiff of any crime. *See* Opp'n ¶ 106. The Due Process Clause does not apply to Plaintiff's implausible claims that the FBI has "accus[ed] [him] in an informal setting to members of the public and through round about, insidious accusations" and that he is "being accused, punished[,] and held to account for crimes in which [he] [has] never faced a criminal trial." *See id.* Additionally, Plaintiff's allegations that his liberty is "threatened on a psychological level" and that there is a "secret ruling[] or executive order" "of some kind against [his] life" are speculative and delusional. *See id.* ¶ 107.

Likewise, Plaintiff does not state a cognizable Eighth Amendment claim because he does not allege that he was incarcerated or subject to the criminal-law function of government. The Eighth Amendment protects individuals from excessive or cruel and unusual punishments in the criminal process and is therefore inapplicable in this context. *See* U.S. CONST. amend. VIII; *see also Ingraham v. Wright*, 430 U.S. 651, 664, 666 (1977) (explaining that the Eighth Amendment concerns "the criminal process" and seeks "to limit the power of those entrusted with the criminal-law function of government").

Lastly, Plaintiff does not state a cognizable Fourteenth Amendment claim because he does not allege that a state or local government denied him equal protection of the law based on a protected classification. Plaintiff asserts claims against only the FBI, and it is the Fifth Amendment, not the Fourteenth Amendment, that protects a person against deprivations of equal protection by the federal government. *Compare* U.S. CONST. amend. V ("No person shall . . .be deprived of life, liberty, or property, without due process of law"), *with* amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law"). *See also Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (incorporating equal protection into the Fifth Amendment's Due Process Clause). In any case, the Equal Protection Clause does not apply to Plaintiff's conclusory claim that "being sexually promiscuous under the influence of alcohol and equating that as sexual assault or rape is an unfair and [equal protection] violation." *See* Opp'n ¶ 111.

Even if these constitutional rights applied, Plaintiff's *Bivens* claims should be dismissed in light of the Supreme Court's reasoning in *Abbasi*, in which the Court "made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). The Supreme Court has never recognized a *Bivens* remedy for a Fourth Amendment claim that does not involve a search or seizure, a Fifth Amendment claim outside the context of gender discrimination in the workplace, or an Eighth Amendment claim outside the context of failure to provide proper medical care to an inmate. *See Abbasi*, 137 S. Ct. at 1855 ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."). Nor has the Court expanded the *Bivens* remedy to Sixth Amendment or Fourteenth Amendment claims. *See id.* Therefore, Plaintiff again fails to state a cognizable claim for relief.

D. Plaintiff fails to show that his *Bivens* claims are timely.

Plaintiff describes fourteen pages of events that allegedly occurred while he was serving in the U.S. Army between April 2017 and March 2019. *See* Opp'n pp. 4-18. Plaintiff then continues for three more pages to describe events that allegedly happened between March 2020 and September 2020. *See id.* pp. 18-21. Plaintiff's *Bivens* claims arising from all these alleged events are barred by the two-year statute of limitations. *See Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926 (9th Cir. 2004) (citing *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999)).

Plaintiff contends that because there was a continuing conspiracy, the statute of limitations is extended. Opp'n ¶ 116. Although it is difficult to discern the exact nature of Plaintiff's conspiracy claim, "[c]onspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons." *Abbasi*, 137 S. Ct. at 1867. However, Plaintiff does not identify a single FBI agent involved or demonstrate the existence of any agreement. *See* Opp'n ¶¶ 116-116b. Nor does Plaintiff explain why the FBI would target him. Plaintiff's conspiracy claim is vague and conclusory, and it is unclear what Plaintiff asserts that the FBI even conspired to do. *See id.*

E. This case lacks sufficient merit to justify appointment of pro bono counsel.

Generally, a person has no constitutional right to counsel in civil actions. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). A district court may appoint counsel for indigent civil litigants only under "exceptional circumstances." 28 U.S.C. § 1915(e)(1); *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). When determining whether "exceptional circumstances" exist, a court must consider "the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2015) (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)).

This case does not present "exceptional circumstances" that would justify the appointment of pro bono counsel. Plaintiff is unlikely to succeed on the merits because his allegations of a fantastical FBI conspiracy are inherently implausible and without merit. *See, e.g.*, *Hinkle v. FBI*, No. CV-22-01660-PHX-JAT, 2022 WL 15517927, *2-3 (D. Ariz. Oct. 27, 2022) (dismissing action and denying appointment of counsel because Plaintiff's claims that various government defendants and private parties were conspiring to "torture and kill her using lasers from drones" were "wholly incredible" and "without merit"); *Christiana v. United States*, No. SA CV 17-0089-DOC (JCGx), 2017 WL 6512220, *2 (C.D. Cal. Mar. 29, 2017) (dismissing action because claims that the United States was "electrically shocking parts of Plaintiff's body" and "burglarizing Plaintiff's home" were "inherently implausible and obviously without merit").

III. CONCLUSION

Even if Plaintiff were to amend his Complaint to name unknown federal agents as defendants, the Court lacks subject matter jurisdiction over Plaintiff's fantastical claims. Moreover, even if the Court were to find that the substantiality doctrine does not apply, Plaintiff fails to state a plausible claim upon which relief can be granted. The deficiencies of Plaintiff's Complaint remain incurable, and any amendment would be futile. The Court should not give Plaintiff unrealistic expectations or false hope by extending the life of a frivolous case.

For all the reasons discussed above and in Defendant's motion to dismiss, the Court should dismiss this action without leave to amend.

DATED: November 23, 2022

STEPHANIE M. HINDS
United States Attorney

/s/ James A. Scharf
JAMES A. SCHARF
Assistant United States Attorney
Attorneys for Defendant

JULIA WANG

1516 Henry Street Apt. 4, Berkeley, CA 94709 • (408) 396-2943 • juliawang@berkeley.edu

WRITING SAMPLE

I wrote the attached brief based on a hypothetical fact pattern from my Written and Oral Advocacy class. The research, analysis, and writing are substantially my own, including revisions based on comments provided by my professor. No one else has edited this brief.

BERKELEY LAW
LEGAL RESEARCH, ANALYSIS, AND WRITING PROGRAM
3037350169
University of California, Berkeley, School of Law
Berkeley, California 94720
Telephone: (510) 555-3200
Facsimile: (510) 555-9366

Attorneys for Plaintiff
Workers Protection Project

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WORKERS PROTECTION PROJECT, Plaintiff, v. FEDERAL HIGHWAY ADMINISTRATION, Defendant.	Civil Action No. 21-CV-1836

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Professor: Ann Reding

TABLE OF CONTENTS

I. INTRODUCTION

Through the broad language of the Freedom of Information Act ("FOIA"), Congress ensures government accountability and transparency by providing public access to federal agency records, limited only by narrow statutory exemptions. Plaintiff Workers Protection Project ("WPP") has requested that Defendant Federal Highway Administration ("FHWA") disclose a promotional video that it filmed at a construction site thirty minutes before a tragic accident killed four workers shown in the video. FHWA has violated FOIA by improperly withholding the video under an exemption that protects personal privacy. Because the exemption does not apply, FHWA must disclose the requested video under FOIA. Accordingly, WPP respectfully moves for summary judgment to compel production of the video and preserve FOIA's goal of full agency disclosure.

II. STATEMENT OF FACTS

WPP is a non-profit organization dedicated to reducing workplace deaths and injuries and protecting the health of 130 million workers in the United States. Martinez Decl. ¶¶ 2, 4. In 2019, 5,190 workers were killed on the job, and over 21 percent of these fatalities were in construction. *Id.* ¶ 4. Through research reports, the organization publicizes risks to workers' health and educates the public on improving workplace safety. *Id.* ¶ 2.

On March 4, 2021, FHWA Deputy Administrator Chantal Kirby and public affairs staff visited the Caveman Bridge construction site to film a promotional video about the Competitive Highway Bridge Program ("CHBP"), which had awarded $900,000 to support the $5.3 million rehabilitation project. Dexter Decl. ¶¶ 15, 17. This video was to be part of a series publicly available on FHWA's website to encourage state transportation departments to apply to CHBP

and inform citizens about the program and FHWA's use of public funds. *Id.* ¶¶ 10, 12; Martinez Decl. ¶ 9.

In the video, Kirby spoke about the $225 million that FHWA is awarding through CHBP to help states repair and preserve highway bridges. Dexter Decl. Ex. E. FHWA selects projects for CHBP funding after considering their use of innovations, support for economic vitality, and project readiness. *Id.* Ex. F. The Caveman Bridge Rehabilitation Project was one of the first CHBP awards, and Kirby described the Caveman Bridge as "just the type of state project that [CHBP] was designed to fund." *Id.* ¶ 15, Ex. E. She also noted the construction practices used to repair the cracked concrete and bridge deck. *Id.* Ex. E. The background of the video includes construction sounds and footage of Hector Sanchez, Robby Church, Juan Orozco, and Derek Farrell actively working on the bridge. *Id.* After her statement, Kirby spoke with the four construction workers, who shared their enthusiasm for the project and their families' connections to the bridge. *Id.*

Thirty minutes after the video was filmed, Sanchez, Church, Orozco, and Farrell were tragically killed after the support structure holding up the bridge collapsed on them. *Id.* ¶ 18. In the week following the collapse, news outlets across the nation covered the tragedy and its aftermath. Martinez Decl. ¶ 7. Soon after, however, media attention quickly turned to other national events like storms and wildfires. *Id.* Local media continued to cover developments that arose in the investigation surrounding the collapse. *Id.* Many reports included interviews with friends and families of the deceased workers or footage of the joint memorial service, but the media respected the Orozco family's wishes to not report on his memorial service. *Id.* ¶ 8.

As part of its research, WPP requested the video, which was the only footage of the Caveman Bridge on the day of the collapse, from FHWA under FOIA. Dexter Decl. ¶¶ 5, 12.

FHWA denied the request under Exemption 6, claiming an invasion of privacy because the four workers were identifiable throughout the video. *Id.* ¶¶ 6, 22. Additionally, according to FHWA, the footage that it filmed does not include the bridge's collapse or information about what led to the collapse. *Id.* ¶ 23. After WPP's appeal, FHWA released the transcript of the video but still withheld the video in full under Exemption 6. *Id.* ¶¶ 7-8.

III. ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment is appropriate when the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts typically decide FOIA cases on motions for summary judgment. *See, e.g.*, *Charles v. Off. of the Armed Forces Med. Exam'r*, 935 F. Supp. 2d 86, 93 (D.D.C. 2013). Courts properly grant a plaintiff's summary judgment motion where the government fails to demonstrate that the requested information is exempt from disclosure. *See, e.g.*, *id.* at 100.

B. Defendant FHWA cannot withhold the video under Exemption 6 because disclosure is not a "clearly unwarranted" invasion of personal privacy.

Congress enacted FOIA to inform the public about government operations and "open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). FOIA requires agencies to comply with public requests for disclosure unless the requested information falls within a statutory exemption. 5 U.S.C. § 552(a), (b); *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). The limited nature of the Act's nine exemptions further demonstrates the legislative intent for "full agency disclosure." *Rose*, 425 U.S. at 360-61. The narrow language of Exemption 6 allows withholding only if disclosure constitutes a "clearly unwarranted" invasion of personal privacy, thereby mandating a strong presumption in favor of disclosure. § 552(b)(6); *Wash. Post Co. v. U.S. Dep't of Health &*

Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1982). Additionally, the government bears the burden of rebutting this presumption. § 552(a)(4)(B).

Courts conduct a four-step analysis to determine whether the government has satisfied the heavy burden of Exemption 6. § 552(b)(6); *Wash. Post*, 690 F.2d at 261. First, an agency may only withhold information if it is part of a medical, personnel, or "similar file." § 552(b)(6). Furthermore, the agency must establish that disclosure would invade a substantial privacy interest. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). Then, the government must evaluate the public interest in disclosure. *Wash. Post*, 690 F.2d at 261. Finally, the agency must show that disclosure would be "clearly unwarranted" by balancing the competing interests and demonstrating that the privacy interest outweighs the public interest. *Id.* Courts have used analysis regarding privacy and public interests from cases involving Exemption 7(C), which protects privacy in information compiled for law enforcement purposes, to also govern discussions of those interests in Exemption 6 cases. § 552(b)(7)(C); *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.,* 510 U.S. 487, 496 n.6 (1994); *see also U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 768 (1989) (using Exemption 6 case *Rose* to discuss Exemption 7(C)).

Although the video WPP has requested is a "similar file," Exemption 6 does not apply because the privacy interest in the video is minimal and because the significant public interest in disclosing the video outweighs even a substantial privacy interest. Since disclosure is not a "clearly unwarranted" invasion of privacy, FHWA must release the requested video.

1. **The privacy interest of the workers' families is minimal because the video does not include intimate detail that will be publicly exploited.**

Under FOIA, the concept of privacy encompasses the "control of information concerning [one's] person." *Reps. Comm.*, 489 U.S. at 763. Along with individual privacy interests,

Exemption 6 also recognizes the privacy interests that surviving relatives have in government records relating to deceased family members. *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171 (2004); *N.Y. Times Co. v. NASA* (*NASA I*), 920 F.2d 1002, 1004 (D.C. Cir. 1990). The privacy interest is minimal unless the files contain highly personal "intimate details." *Getman v. Nat'l Lab. Rels. Bd.*, 450 F.2d 670, 674 (D.C. Cir. 1971).

In *Favish*, the Supreme Court found that survivors had a substantial privacy interest in their family member's death-scene images. 541 U.S. at 171. After the death of White House deputy counsel Vince Foster, five separate investigations by government agencies and independent counsels concluded that Foster died by suicide. *Id.* at 161. Allan Favish believed that the investigations were untrustworthy, so he requested disclosure of the photographs of Foster's body that had been taken at the death scene. *Id.* The Office of Independent Counsel refused the request under Exemption 7(C). *Id.* In determining the relevant privacy interest, the Court noted that Foster's family had a right to be shielded from media harassment and scrutiny. *Id.* at 167. A leaked photo had already made the Fosters the focus of distasteful press coverage and caused them additional pain. *Id.* As such, the Court concluded that family members had the right to limit public exploitation of death-scene images to secure their own peace of mind. *Id.* The Court further held that neither Foster's status as a public official, nor the fact that other photos had been made public, lessened the substantial privacy interest. *Id.* at 171. Because of the graphic nature of the images requested and the media sensationalism of Foster's death, the Supreme Court ruled that FOIA protected survivors' substantial privacy interest in their relative's death-scene images. *Id.* at 170.

Similarly, in *New York Times Co. v. NASA* (*NASA II*), 782 F. Supp. 628, 633 (D.D.C. 1991), astronauts' surviving relatives had a substantial privacy interest in an audiotape of the

moments leading up to the Challenger shuttle's disintegration and the astronauts' deaths. Following the disaster, media coverage was intensive and extensive, with the New York Times alone publishing 600 articles on the tragedy and its aftermath, including reports of families' struggles to cope with the loss of their loved ones a year later. *NASA I*, 920 F.2d at 1004. As part of this coverage, a Times reporter requested transcripts of all communications recorded on the shuttle during the 73-second flight, as well as copies of the recordings. *NASA II*, 782 F. Supp. at 629-30. NASA released the transcript of the tape but withheld the recording itself under Exemption 6. *Id.* The Court found that the astronauts' families had a substantial privacy interest in preventing disclosures that would cause additional suffering and anguish due to the "intimate detail" of how the astronauts spoke immediately prior to their deaths. *Id.* at 631. Given the already-extensive public attention in the Challenger disaster, disclosing the audio recordings would lead to a barrage of new press inquiries about the families' reactions to hearing their loved one's voices and articles describing the astronauts' emotional states in their last moments. *NASA I*, 920 F.2d at 1004; *NASA II*, 782 F. Supp. at 631. Because of the nature and timing of the recording, as well as the further anguish that disclosure would cause due to heightened media attention, the Court held that the astronauts' families had a substantial privacy interest. *Id.* at 633.

On the contrary, in *Charles*, surviving family members did not have a substantial privacy interest in their relatives' redacted autopsy records. 935 F. Supp. 2d at 99-100. Journalist and veteran Roger Charles requested records that analyzed fatal bullet wounds on troops wearing body armor as part of his investigation into the armor's effectiveness. *Id.* at 89-90. The medical examiner's office identified over 100 body autopsy files that responded to Charles' request but withheld all of them under FOIA Exemption 6. *Id.* at 90-91. The Court distinguished the autopsy reports from the death-scene images in *Favish* by noting that relatives would not be able to

identify which redacted report related to their family member. *Id.* at 99. Because the families failed to demonstrate that they would later encounter the records or could discern that a report related to their family member, the Court found only a "mere possibility" of an invasion of privacy. *Id.* Furthermore, the information within the records was not of such a nature to "shock the sensibilities of surviving kin." *Id.* (quoting *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987)). Because of the uncertainty of even encountering the records and the lack of graphic information within them, this Court held that the family members had a minimal privacy interest. *Id.*

Here, the privacy interest is minimal because the video does not contain graphic images or the final moments before the worker's deaths and is not subject to public exploitation. The requested video does not contain intimate detail that invokes a substantial privacy interest because its contents are not gruesome. In *Favish*, the requested photographs depicted the deceased's body following his suicide. 541 U.S. at 161. Unlike the graphic nature of those death-scene images, the video in this case shows the smiling workers speaking about their families' histories with the bridge and sharing their enjoyment of their work with Deputy Administrator Kirby. *See id.*; Dexter Decl. Ex. E. Even in *Charles*, where the requested autopsy files included information about fatal bullet wounds, the privacy interest was minimal because the information within redacted records would not shock the sensibilities of surviving relatives. 935 F. Supp. 2d at 90, 99. Similarly, although the workers are identifiable, the video here does not contain gruesome scenes, such as images of the deceased workers' bodies, that would agitate or shock the workers' families. *See id.*; Dexter Decl. Ex. E. Therefore, the privacy interest is minimal because the video does not include intimate detail in the form of graphic content.

The families' privacy interest in the video is also minimal because it was filmed long before the workers' deaths. In *NASA II*, the intimate detail of the audiotape lay in how the astronauts spoke immediately before their deaths. 782 F. Supp. at 631. Unlike in *NASA II*, where the audiotape recorded the 73 seconds leading up to the astronauts' deaths, the video in this case was filmed thirty minutes prior to the workers' deaths. *See id.* at 629; Dexter Decl. ¶ 18. While the astronauts were being recorded up until the shuttle's disintegration, neither the workers' deaths nor the moments leading up to the collapse appear in the video. *See NASA II*, 782 F. Supp. at 630; Dexter Decl. Ex. E, ¶ 23. Unlike the astronauts in *NASA II*, who might have been aware of potential problems on board the shuttle leading up to their deaths, the workers in this case were not aware that a fatal accident would occur thirty minutes after they finished filming. *See* 782 F. Supp. at 633. Since the video does not contain intimate detail of the last moments before the workers' deaths or the deaths themselves, the privacy interest in the video is minimal.

Lastly, the privacy interest in the video is minimal because the video will not be publicly exploited by extensive media attention. Unlike the Challenger disaster in *NASA II*, where national media coverage continued for at least a year afterward, national media attention following the collapse lasted for only a week. *See NASA I*, 920 F.2d at 1004; Martinez Decl. ¶ 7. Furthermore, in *Favish*, the media would certainly exploit the disclosure of additional death-scene images because it had already done so with a leaked image, which had caused Foster's relatives further anguish. *See* 541 U.S. at 167. However, here, the media has respected the Orozco family's request to not report on his memorial service. Martinez Decl. ¶ 8. Furthermore, some of the workers' surviving relatives have granted interviews or released press statements, showing that some families have been willing to work with media outlets in their coverage of the collapse. *Id.* Similarly to *Charles*, where the privacy interest was minimal when there was only a

"mere possibility" of later encountering the autopsy records, in this case, the families are unlikely to suffer additional pain from disclosure of the video because the media will not constantly report on the collapse or disrespect the families' wishes. *See* 935 F. Supp. 2d at 99; Martinez Decl. ¶¶ 7-8. Since the media will not exploit the video upon its disclosure, the privacy interest is minimal.

Because the video does not contain graphic images, does not show the moments right before the workers' deaths, and is not subject to intense media exploitation, the surviving families' privacy interest in the video is minimal.

2. Disclosing the video is not a "clearly unwarranted" invasion of privacy because the public interest outweighs the privacy interest.

Given FOIA's strong presumption in favor of disclosure, the public interest in releasing government records can outweigh even a substantial privacy interest. *Multi Ag Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). When the public interest outweighs the privacy interest, disclosure is not a "clearly unwarranted" invasion of privacy, and Exemption 6 does not apply. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991). Here, the significant public interest in disclosing the video, which sheds light on agency action, outweighs even a substantial privacy interest. Because of the significant public interest and minimal privacy interest in the video, Exemption 6 does not apply, and FHWA must release the requested video.

a. The public interest in disclosure is significant because the video provides insight into FHWA's agency operations.

The public interest in FOIA disclosure is significant if releasing the requested information furthers "citizens' right to be informed about what their government is up to." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 34 (D.C. Cir. 2002). There is no public interest

in disclosing information that reveals "little or nothing about an agency's own conduct." *Reps. Comm.*, 489 U.S. at 773.

In *Multi Ag*, the D.C. Circuit found a significant public interest in databases regarding federal subsidy programs. 515 F.3d at 1232. Multi Ag, an agricultural data vendor, sought records with crop data, field acreage, and farm map images that the U.S. Department of Agriculture ("USDA") used to monitor compliance with farm subsidy regulations. *Id.* at 1226-27. Although the files contained financial information about individual farmers, the court ruled that the data showed whether a particular farm was eligible to participate in a subsidy program and therefore "shed[] light on the agency's performance." *Id.* at 1231 (quoting *Reps. Comm.,* 489 U.S. at 773). Only if USDA disclosed the requested data would the public be able to verify whether the agency was properly checking for compliance and lawfully administering its programs. *Id.* at 1231-32. Additionally, the court held that it was especially important to scrutinize agency action that distributes "extensive amounts of public funds" through financial benefits. *Id.* Because the agency used the requested information to run its programs, and the programs incurred large public costs, the D.C. Circuit concluded that there was a significant public interest in releasing the databases. *Id.*

Likewise, in *Advocates for Highway & Auto Safety v. Federal Highway Administration*, 818 F. Supp. 2d 122, 128 (D.D.C. 2011), there was a strong public interest in disclosing videotapes of drivers participating in a fatigue study because the videos informed the public about an expensive agency project. As part of its review of hours-of-service regulations, FHWA filmed over 4,000 hours of drivers' faces and the road before them to observe how fatigue developed. *Id.* at 124. Advocates for Highway and Auto Safety filed a FOIA request for 199 hours of those videotapes, which FHWA denied under Exemption 6. *Id.* at 125. In analyzing the

public interest, the Court noted that the study informed future agency rules and subsequent driver research. *Id.* at 126-27. The Court found a significant public interest in disclosing videos that FHWA had relied on to formulate a rule, even if they related to specific individuals, because the videos would provide insight into FHWA's rulemaking process. *Id.* at 127. Furthermore, the videos would reveal information about government expenditures on a large project that spanned seven years and cost around $4.5 million, thereby shedding light on the inner workings of FHWA. *Id.* at 125, 127. Lastly, due to controversy over the objectivity of FHWA's data processing methods, the public had a heightened interest in validating the accuracy of data extraction. *Id.* at 127-28. Because the videos played a role in forming agency rules, showed how and why FHWA spent public funds, and would allow for verification of the study's results, this Court concluded that the public interest in disclosure was significant. *Id.* at 128.

Similarly, in *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 90 (D.D.C. 2003), the government failed to properly consider the public disclosure interest when it withheld records relating to a Forest Service firing operation. Michael Hertzberg, a lawyer representing individuals whose properties were allegedly destroyed from fires caused by that operation, requested documents and videos relating to the firing operation and subsequent agency investigation. *Id.* at 73. USDA released most of the requested information but fully withheld two videos and redacted four more under Exemption 6. The Court determined that the videos could reveal additional information relating to the wind and wildfire conditions at the time of the firing operation, as well as the paths of the various fires. *Id.* at 89. Disclosing the videos would therefore allow the public to evaluate "how the agency responded and whether it failed to perform its official functions." *Id.* (citation omitted). Because the videos could provide useful

information beyond what was already released, this Court found that there could be a public interest in disclosure. *Id.* at 90.

In contrast, in *NASA II*, there was a minimal public interest in disclosing the audiotape of the minute before the Challenger astronauts' deaths. 782 F. Supp. at 633. The Court found the New York Times' claim that the recording might contain background noises revealing additional information about the disaster to be extremely speculative. *Id.* According to NASA, the audiotape did not contain any background noises aside from the sounds of the rocket boosters. *Id.* Furthermore, the Court held that any information that could be gleaned from voice inflections or background noises in the recording would not contribute significantly to the public's understanding of NASA's operations. *Id.* What the astronauts knew or did not know on board the shuttle would not reveal anything about NASA itself. *Id.* Because the existence of voice inflections and background noises in the recording was speculative, and these sounds would not provide additional information about agency action, the Court concluded that the public disclosure interest was very minimal or even non-existent. *Id.*

Here, the public disclosure interest is significant because the video informs the public about a FHWA program, portrays how FHWA uses public funds, and includes additional information beyond what has already been disclosed. The public interest is significant since FHWA produced the video to educate the public and promote an agency program. As one of the first CHBP awards, Caveman Bridge epitomized the type of projects CHBP was created to support. Dexter Decl. ¶ 15, Ex. E. FHWA intended for the Caveman Bridge video to be freely available on its website and inform the public and state transportation departments about CHBP. Dexter Decl. ¶¶ 12, 14. Similar to *Advocates*, where the videos of the drivers guided future agency rules, in this case, the video would encourage states to apply for CHBP funding for future

projects. *See* 818 F. Supp. 2d at 126; Dexter Decl. ¶ 14. Just as in *Advocates*, where the videos cast light on FHWA's rulemaking process, here, the video would illustrate how FHWA selected projects and which projects or innovative technologies would be eligible for funding. *See* 818 F. Supp. 2d at 127; Dexter Decl. ¶ 16, Ex. F. Because the video would inform both states and citizens about FHWA programs, the public interest in its disclosure is significant.

Further, the public disclosure interest is significant because the video portrays how and why FHWA spends public funds. Along with educating the public about CHBP, the video was meant to show how taxpayer funds are being used. Martinez Decl. ¶ 9. In total, the agency is spending $225 million on CHBP to assist state replacement and rehabilitation projects. Dexter Decl. Ex. F. In this case, FHWA funded $900,000 of the $5.3 million Caveman Bridge project through CHBP. *Id.* Ex. G, ¶ 15. In *Multi Ag*, the public had a special need to scrutinize agency action that distributed large amounts of taxpayer money through financial benefits. 515 F.3d at 1232. Similarly, there is a strong public interest in examining how FHWA awards its extensive public funds for state infrastructure projects through CHBP. *See id.*; Dexter Decl. Ex. F. Just as in *Advocates*, where disclosure of the videos shed light on an agency study lasting years and costing millions of dollars, in this case, releasing the video will inform the public about the Caveman Bridge project, which lasted two years and cost millions in state and federal funds, as well as about CHBP, which is even larger in scope. *See* 818 F. Supp. 2d. at 125; Dexter Decl. Exs. F-G. Additionally, like in *Advocates*, where the public had an interest in verifying the agency study's results, here, the public also has an interest in confirming how FHWA is using public funds in CHBP projects. *See* 818 F. Supp. 2d. at 127-28. Because the video will provide insight into FHWA's use of taxpayer money, the public interest in its release is significant.

Finally, the public interest in disclosure is significant because the public can gain additional information from the video that cannot be gleaned from already-released records. The transcript notes that the video shows workers actively repairing part of the bridge and includes background construction sounds while Deputy Administrator Kirby is speaking about the project. *Id.* Ex. E. Similar to *Hertzberg*, where the video could show information about wind and wildfire conditions that would not otherwise be known, in this case, the video would give more information not included in the transcript about the construction and workplace safety practices used during the rehabilitation project. Unlike in *NASA II*, where the existence of any background noises was mere speculation, here, the transcript definitively states that the video contains scenes of workers on the job and sounds of construction. *See* 782 F. Supp. at 633; Dexter Decl. Ex. E. Furthermore, unlike in *NASA II*, where the audio recording lasted just over a minute, the video in this case is several minutes long and therefore reveals more information though its additional length and imagery. *See* 782 F. Supp. at 629; Dexter Decl. Ex. E. Therefore, since the video contains additional information beyond what is in the transcript, the public disclosure interest is significant.

Because the video was produced to inform the public and promote a FHWA program, demonstrates FHWA's use of public funds, and provides additional information beyond what has been released, the public interest in disclosing the video is significant.

b. The balance of competing interests mandates disclosure because the significant public interest outweighs the minimal privacy interest.

The balancing test for Exemption 6 requires weighing the privacy interest with the public interest in disclosure. *Horner*, 879 F.2d at 874. If there is no significant privacy interest in the requested information, or if the public interest outweighs the privacy interest, then FOIA demands disclosure. *Id.*; *Ray*, 502 U.S. at 177.

In *Multi Ag*, the D.C. Circuit ruled that Exemption 6 did not apply because the significant public interest in farm subsidy data outweighed even a substantial privacy interest, and therefore the government had to disclose the requested information. 515 F.3d at 1233. The court acknowledged that disclosure would implicate a greater than minimal privacy interest because the requested data revealed farmers' personal finances. *Id.* at 1229-30. However, in balancing the interests, the court noted that Congress enacted FOIA to "open agency action to the light of public scrutiny" and mandate a strong presumption in favor of disclosure. *Id.* at 1232 (quoting *Rose*, 425 U.S. at 361). As such, the court determined that the public had a significant interest in information that USDA used to administer its subsidy program. *Id.* Given USDA's relatively weak showing of an invasion of privacy, the strong public interest in data that allowed the public to monitor agency action, and FOIA's presumption in favor of disclosure, the D.C. Circuit ruled that the public interest outweighed the privacy interest, and USDA could not withhold the requested information. *Id.* at 1233.

Here, the significant public interest in disclosing the video outweighs the privacy interest. Similar to *Multi Ag*, where the privacy interest in the requested data was not particularly strong despite revealing farmers' financial information, the privacy interest in this case is minimal because the video does not include any graphic content and was filmed thirty minutes before the worker's deaths. *See* 515 F.3d at 1230; Dexter Decl. Ex. E, ¶ 18. Since there is no significant privacy interest in the video, FOIA mandates disclosure. *See Multi Ag*, 515 F.3d at 1229. Furthermore, like in *Multi Ag*, where the public interest in the data was significant because disclosure would allow the public to evaluate USDA's administration of its subsidy program, here, the public interest is significant because the video was produced to promote a costly and extensive FHWA program and includes new information that has not been disclosed. *See id.* at

1232; Dexter Decl. ¶ 14, Ex. E. Given the minimal privacy interest and significant public interest in a video that would allow the public to monitor an agency program, as well as FOIA's presumption in favor of disclosure, the public interest outweighs the privacy interest, and disclosing the video is not a "clearly unwarranted" invasion of privacy.

IV. CONCLUSION

Defendant FHWA violated FOIA's goal of full agency disclosure by withholding the video that it filmed on the day of the Caveman Bridge accident. Exemption 6 does not apply because the families' privacy interest in the video is minimal and because the significant public disclosure interest outweighs the privacy interest. Since FHWA has failed to meet the heavy burden of Exemption 6, FOIA mandates disclosure. As such, Plaintiff WPP respectfully requests that this Court grant summary judgment to compel disclosure of the video.

Applicant Details

First Name	**Andre**
Middle Initial	**J**
Last Name	**Washington**
Citizenship Status	**U. S. Citizen**
Email Address	**juwaan@gmail.com**
Address	**Address** Street **277 Alexander St. #804** City **Rochester** State/Territory **New York** Zip **14607** Country **United States**
Contact Phone Number	**7734164635**

Applicant Education

BA/BS From	**University of Rochester-Eastman School of Music**
Date of BA/BS	**May 2010**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 15, 2019**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Chicago Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia, Illinois**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Hemel, Daniel
daniel.hemel@nyu.edu
212.998.6354
Hubbard, William
whubbard@uchicago.edu
Lakier, Genevieve
glakier@uchicago.edu
773-702-9494

References

Judge Frank P. Geraci, Jr., frank_geraci@nywd.uscourts.gov, (585) 613-4090;

Allison Satyr, asatyr@sidley.com, 312-853-4342;

James Snyder, James.snyder@sidley.com, 312-853-7153;

This applicant has certified that all data entered in this profile and any application documents are true and correct.

André J. Washington
277 Alexander St. #804
Rochester, NY 14607

June 24, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, Michigan 48226

Dear Judge Davis:

I am currently a term law clerk for District Judge Frank P. Geraci, Jr. in the Western District of New York and I am applying for a clerkship in your chambers for the term beginning August 19, 2024. I delight in the academic nature of the work and cherish the opportunity to participate in the public service the courts provide, and I am looking for additional experience from the perspective of the appellate court.

As a law clerk, I bring to bear the analytical skills I sharpened during my nearly three years practicing as a finance attorney at Sidley Austin LLP. My experience identifying and solving issues within complex financing transaction documents prepared me to efficiently distill relevant case law and infer rules where the precedent lacks clarity. I also relish the opportunity to meaningfully apply the writing skills I honed while staffing the *Chicago Journal of International Law* and refined through independent study after graduating, leading to the publication of an article in the *Pittsburgh Law Review Online* in the summer of 2022.

My work product thus far in my clerkship with Judge Geraci has included substantive decisions in a variety of areas, including habeas corpus review of state convictions, civil rights law, RLUIPA, constitutional law, civil procedure and social security. I revel in the variety of the cases as well as the deeper, more studious engagement with the law that is required to resolve each dispute and to ensure the conscientious stewardship of the law. I am eager to build on this experience with an appellate clerkship in your chambers.

A resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Hemel, Hubbard and Lakier will arrive under separate cover. Should you require additional information, please do not hesitate to let me know. Thank you very much for your consideration.

Sincerely,

/s/ André J. Washington

André J. Washington

André J. Washington

277 Alexander St. #804 ♦ Rochester, NY 14607 ♦ 773-416-4635 ♦ juwaan@gmail.com

EDUCATION

The University of Chicago | The Law School, Chicago, Illinois
Juris Doctor and Doctoroff Business Leadership Certificate, *June 2019*

- Chicago Journal of International Law (Staffer)
- Law Students for the Creative Arts (Founder); Black Law Students Association (Treasurer, 2018); OUTlaw (Vice President, 2018)
- Judge James B. Parsons Legacy Speaker Series (Founder)
- University of Chicago Symphony Orchestra (Co-Principal Flutist)

Ecole Normale de Musique de Paris, Paris, France
Artist Diploma, Chamber Music Performance, *June 2013*

Fulbright Fellow, Paris, France *2010 – 2011*

- Received a scholarship to study French flute technique and contemporary négritudes

The Eastman School of Music, Rochester, New York
Bachelor of Music, Applied Flute Performance, *May 2010*

PROFESSIONAL EXPERIENCE

U.S. District Courts, Western District of New York, Rochester, New York
Judicial Law Clerk, February 2023 – Present

- Drafting opinions resolving dispositive motions on behalf of the district judge in a variety of substantive legal areas
- Reviewing, commenting on, and editing opinions drafted by other law clerks
- Managing all docket activity for a portion of the cases pending before the district judge
- Serving on the law clerk continuing legal education committee

Nelson Mullins Riley & Scarborough LLP, Baltimore, Maryland
Associate, Mergers & Acquisitions, June 2022 – February 2023

- Representing business owners and entrepreneurs in sell-side acquisition transactions, including asset and equity sale transactions and mergers
- Leading teams of junior associates and subject matter experts in the review and analysis of diligence materials and the preparation of disclosure schedules
- Advising clients in the process of responding to due diligence inquiries and helping clients understand and revise representations and warranties
- Drafting transaction documents, including reviewing and commenting on purchase agreements, merger agreements and other key ancillary documents

Sidley Austin LLP, Chicago, Illinois
Associate, Global Finance, September 2019 – March 2022
Summer Associate, June 2018 – August 2018

- Represented bank and non-bank lenders in connection with private equity leveraged buy-outs, REIT financings and corporate lending transactions, including senior secured and unsecured credit facilities, unitranche financings, first lien and second lien transactions, subordinated financings, and cash flow as well as asset-based transactions
- Worked with senior attorneys to draft credit agreements, intercreditor agreements, security and pledge agreements, servicing agreements and other ancillary finance transaction documents
- Represented banks and investment funds and other financial intermediaries in structured finance, asset securitization, forward flow purchase transactions and secured lending in connection with the financing and acquisition of consumer credit receivables, including marketplace loans and point-of-sale loans

Just The Beginning — A Pipeline Organization, Chicago, Illinois
Public Interest Law Initiative Fellow, June – September 2019

- Taught a class on the First Amendment and worked with students to develop oral arguments for a mock appellate court argument in connection with a summer pre-law program designed to expose Black high school students to the legal profession

Miller Shakman & Beem LLP, Chicago, Illinois
Summer Associate, June – August 2017
- Assisted in complex commercial litigation matters by conducting legal research, drafting legal memos and attending court room hearings

Political Strategist, Chicago, Illinois
Various Democratic Campaigns, 2014 – 2016
- Reviewed and analyzed voter data to design and implement micro-targeted voter outreach strategies
- Managed outreach to key political stakeholders, including unions and pre-formed voter interest group organizations

PUBLICATIONS

"Race-Based Admissions are Meritocratic Admissions", *Pittsburgh Law Review Online*, Volume 83 (Summer 2022).

"By Omitting Race, the SAT's New Adversity Score Misrepresents Reality", *TIME Online*, May 21, 2019 (Co-Author Daniel Hemel).

"Not So Fast China: Market-Economy Status is Not Necessary for the 'Surrogate Country' Method", *Chicago Journal of International Law* (*CJIL*), Volume 19.1, summer 2018.

CIVIC ENGAGEMENT

Rochester Teen Court, Rochester, New York
Volunteer Attorney, April 2023 - Present
- Assist "teen attorneys" in the preparation of opening and closing statements, and witness questions for a restorative justice court for non-violent teen offenders, and; supervise "teen attorneys" during the adjudicative session

SkyART, Chicago, Illinois
Board Member: Vice Chair, 2019 – May 2023
- Participate in the review, analysis and approval of budgets and long and short-term financing projects, and participated in the drafting a five-year strategic plan that included opening a second location on the West side of Chicago

Illinois Arts Council, Illinois
Board Member: Vice Chair of Music Composition Artist Fellowship Program, April 2020 – September 2021
- Served as vice chair of the music fellowship program grant committee and supervised two expert panels in the review of more than 130 individual grant applications for an arts fellowship award in music composition and for the general operating support of music organizations

Eastman Action Commission for Racial Justice, Rochester, NY (Remote)
Commissioner, July-August 2020
- Served as one of twenty commissioners tasked with thoroughly reviewing the culture, policies, curriculum and admissions practices of the Eastman School of Music and contributed to the drafting of a 175-page report with a complete assessment and recommendations for improvement. The report resulted in significant policy changes at the Eastman School of Music, including the announcement of the new position for a director of Diversity and Inclusion

Democratic Campaign for President, Chicago, Illinois
Candidate for Delegate, September 2019 – March 2020
- Led volunteer outreach efforts throughout the 2nd congressional district in Illinois during the Democratic presidential primary to collect petition signatures for a democratic candidate for delegate, raise money, and increase support for their candidacy among voters in the district

MISCELLANEOUS

- Link to Video Performance # 1 – This is a composition I wrote in honor my Grandmother for Juneteenth.
- Link to Video Performance # 2 – This is a performance with my former chamber music colleagues in Baltimore, MD.
- *Languages* – French

Professor Daniel J. Hemel
Professor of Law
NYU Law School
40 Washington Square South, Room 325
New York, NY 10012
daniel.hemel@nyu.edu

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

André Washington has a remarkably creative mind an insatiable thirst for knowledge. He also has an extraordinary work ethic and a deep commitment to improving his own skills. I believe that you will enjoy working with him enormously, and I recommend him for a clerkship with enthusiasm.

André's path to law school was unusual—which is one of the many things that makes him such an interesting person. A native Chicagoan, he attended a public high school on the city's South Side and found his way into a summer program run by the University of Chicago for talented local students from less privileged backgrounds. He fell in love with the flute, gained admission to the Eastman School of Music in Rochester, and won a Fulbright scholarship after graduation to study both flute and African diasporic intellectual history in France. He went on to pursue a musical performance career in Paris, but ultimately decided that he wanted to contribute more concretely to the city of Chicago and the neighborhoods near where he grew up. And so he returned to his hometown, threw himself into local politics, and ended up playing a pivotal role in the campaigns of Chicago Alderman James Cappleman and Illinois Comptroller Susana Mendoza. By the time he arrived at the University of Chicago Law School in the fall of 2016, he had acquired a worldliness and a range of life experiences that distinguished him from his fellow 1Ls.

I experienced the good fortune of having André as one of 95 students in a Torts class that I taught that fall. (I was a professor at the University of Chicago for seven years before joining the NYU faculty.) André wrestled with the course material in a sophisticated way. He was the most frequent attendee of my office hours, and his questions were some of the best. He read each case carefully and critically, and we have had long conversations about passages in judicial opinions that have piqued his interest. André's performance on my final exam was solid (right around the median), but on other dimensions he ranked very near the top of the class.

Over two more years and additional courses, I got to know André even better and came to appreciate his intellect even more. I had the particular privilege of advising André on a paper regarding non-diversity rationales for race-based affirmative action—a paper that André subsequently published as a law review article with the *University of Pittsburgh Law Review*. André argues in the paper that Justice Powell's decision in *Bakke v. Regents of the University of California*, in which diversity is the only "compelling interest" recognized to support race-based affirmative action, does not close the door to other affirmative action justifications based on different and more developed facts. He argues, in particular, that race-based affirmative action can be justified on meritocratic grounds as a corrective to the implicit biases that infect other inputs to admissions decisions (e.g., non-blind grades), and that Justice Powell's opinion in *Bakke* as well as subsequent Supreme Court case law leave the door open to this and similar rationales. The paper received one of the highest grades I have ever given on an independent study project—a grade fully justified by André's hard work and persuasive writing.

Even while jumping headlong into his courses and his independent research, André continued to play the flute in local performances throughout his time in law school and was an active member of the Black Law Students Association as well as OutLaw. He also earned a well-deserved spot on the *Chicago Journal of International Law*. His community service has continued since law school—including as a Governor-appointed member of the Illinois Arts Council.

I expect that André will ultimately be a respected and accomplished lawyer in who contributes to the life of his community as a volunteer and/or in appointed or elected office. He certainly has the passion and the smarts to make that happen. In the meantime, he will make a marvelous clerk, and I highly encourage you to hire him.

Please do not hesitate to contact me with additional questions. The best way to reach me is via email at daniel.hemel@nyu.edu or cell phone at 914-629-7352. I look forward to singing André's praises at greater length.

Sincerely,
Daniel Hemel

Professor William H. J. Hubbard
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
773-834-8999 | whubbard@uchicago.edu

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I enthusiastically recommend André Washington for a judicial clerkship. I have known André since he was my student as a 1L in my civil procedure course in the fall of 2016, and he and I have stayed in touch since he graduated in 2019. André is a smart, passionate lawyer with a strong sense of personal integrity and a deep commitment to justice. He leavens his focus and dedication with warmth, energy, and good humor. I believe that his inquisitive mind, commitment to the legal craft, and professional drive will make him an asset to your chambers.

As I mentioned, I first got to know André during his first quarter of law school, while teaching Civil Procedure I. (Prior to 2020, this was the first half of a two-quarter civil procedure sequence at Chicago. It focused on the Federal Rules, procedural due process, and the right to jury trial.) Civil procedure may be the least accessible of the 1L courses, and with more than 100 students in the class, it was hard for students to distinguish themselves or for me to get to know them—but André was one of the unintimidated few to come to my office to ask questions about the materials or to seek professional advice. Thanks to his initiative, I got to know André pretty well at a time when most of his classmates were content to toil in near anonymity as 1Ls.

Indeed, I think this fact captures a lot of what sets André apart. Despite being the first in his family to attend law school, he took an entrepreneurial approach to law school, actively reaching out to faculty to build relationships and seek advice. Perhaps this confidence and willingness to engage is a product of his background as an accomplished musician. (He is a flautist who graduated from the prestigious Eastman School of Music and also studied music in France as a Fulbright Scholar.) Or perhaps it is a product of his work on political campaigns for various candidates for office in Illinois.

I also taught a seminar that he took during his 2L year, called “Critical Legal Studies vs. Law and Economics.” Despite the provocative title, the seminar was really about introducing students to several schools of thought in law, including critical legal studies, law and economics, legal realism, and critical race theory, and exploring some of their central ideas and points of divergence and convergence with each other. André was an engaged and active participant in this seminar. True to his character, he was open to the various methodological and ideological perspectives in the course, and he would research and advocate passionately for the viewpoints he found persuasive.
His academic performance in my courses and overall as a law student was solid. In my civil procedure course, he earned a “B” on the exam. In the Critical Legal Studies vs. Law and Economics seminar, he earned a strong “B+” based on his multiple writing submissions and his class participation. These grades are typical of his performance across this three years of law school.

Impressively, André stood out among his classmates as a leader and a doer. In 2018, he founded the Judge James B. Parsons Legacy Speaker Series, a distinguished speaker event that serves as the keynote for the Judge James B. Parsons Dinner. This event celebrates the legacy of Judge James B. Parsons, a distinguished graduate of the University of Chicago Law School who was the first Black Article III district court judge. It was the brainchild of André, who identified Judge Parsons as an unheralded alumnus of our law school and mobilized the Black Law Students Association (of which he was Treasurer) to create the event. Indeed, he was instrumental in organizing students, connecting with faculty and the administration, and in fundraising from law firms to sponsor it. Thanks to André’s leadership, the event was a smashing success. Judge Ann Williams of the Seventh Circuit was the speaker, and the dinner drew a large group of faculty, students, alumni, judges, and even descendants of Judge Parsons (who were recognized as part of the event). André’s efforts made this happen, and the Judge Parsons Dinner continues today to be one of the flagship events of the year for the law school.

In addition to his ambitious and impactful work with BLSA, André worked on a student journal (the Chicago Journal of International Law), served on the board of OutLaw, played flute in the University’s symphony orchestra, and organized and performed in smaller concerts. One of the highlights of my interactions with students over the years has been the chance I had to see him perform as part of a flute, piano, and cello trio in a small group setting. Although I am no expert on classical music, the concert was magnificent!

In the few years since he has graduated, André and I have kept in touch. I treasure his good humor, intellectual curiosity, and candor. He has a colorful personality: he is energetic but thoughtful; he has strong views yet is open minded; he is frank but warm; he takes his work seriously but laughs easily; he speaks his mind while welcoming advice.
To sum up, André is smart and passionate about the law. He will work hard as your clerk and will cherish the mentorship you provide. I recommend him for a judicial clerkship with enthusiasm.

Sincerely,

William H.J. Hubbard

William Hubbard - whubbard@uchicago.edu

Genevieve Lakier
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
glakier@uchicago.edu | 773-702-1223

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Re: Clerkship recommendation for André Washington

Dear «Salutation» «Last_Name»:

It is with great enthusiasm that I write to recommend André Washington for a clerkship in your chambers. André is an extremely smart, ambitious, and passionate young lawyer. I have no doubt he will make an excellent law clerk. I highly recommend him.

I had the pleasure of teaching André for two quarters of Criminal Law and was very impressed with his performance, both inside and outside of class. André happened to be the first student I called on in the class—a fact that I remember because of his memorable performance during the cold call. Students are often extremely nervous when first cold called and it can be difficult as a result to foster good conversation in the first few days of school. André, however, dove into the cold call with gusto and no apparent nerves. He answered my increasingly difficult questions with apparent ease and took such obvious pleasure in thinking through the material out loud with me that other students visibly relaxed, straightened up, and started smiling. His cold call set a great tone for that quarter of criminal law and proved a good indication of the kind of law student he would turn out to be: engaged, enthusiastic, and smart.

Indeed, I have met few law students in my time at the law school who are as engaged with the material or as passionate about it as André. His path to law school was somewhat circuitous—André was a musician and a political analyst before he became interested in law. Yet it was almost immediately apparent upon meeting him how fascinating he found his legal studies and how seriously he was committed to his work. And although for some law students, early enthusiasm flags by their 3L year, when André took Constitutional Law II (Freedom of Speech) with me his 3L year, he remained as engaged, interested, thoughtful and delighted as he had been during his first year. He also did very well—earning a 179 or B+, well above the class median.

In addition to being a serious, passionate, and motivated student of the law, André is also an eclectic and interesting person, with a multitude of interests. He is a talented flautist who speaks fluent French and spent three years in France, working in the theatre and studying French music. He is also a local kid, who grew up only a few blocks from the University of Chicago and who brought to bear in class discussion a local perspective on many of the doctrinal debates we engaged in about crime and policing that was both quite unique and extremely valuable. I benefited greatly from his presence in the criminal law class, and I know that the other students benefited as well.

As perhaps is obvious from what I have already said, André was not only a good student but a charming person who was well-liked by his peers, effervescent in his enthusiasm, and admirable in his ambitions. For all these reasons, I highly recommend André for a clerkship in your chambers. He is analytically sharp, curious, sincere, and very, very hard-working. There are very few students I can think of who would benefit more from a clerkship, or who would give more to it If I can do anything to aid you in your decision, or if you have any questions, please do not hesitate to email (glakier@uchicago.edu) or call (773 702-1223).

Sincerely,

Genevieve Lakier

Professor of Law

The following writing sample is excerpted from an opinion that I drafted for District Judge Frank P. Geraci, Jr. and used with his permission. The language and reasoning are my own with light edits from the Judge and co-clerks.

INTRODUCTION

Pursuant to 28 U.S.C. § 2254, petitioner, Natalie A. Johnson brings this *pro se* habeas petition to challenge her state-court convictions for (1) Murder in the Second Degree, in violation of New York Penal Law § 20.00 and § 125.25(1) ("intentional murder") and (2) Felony Murder in the Second Degree, in violation of New York Penal Law § 125.25(3) ("felony murder"). ECF No. 1. The charges arose out of Petitioner's participation in the robbery and murder of Edline Chun in February 2013. *Id.* Respondent Eileen Russell opposes the petition. ECF Nos. 21-2, 28. For the reasons that follow, Ms. Johnson's request for habeas relief is DENIED.

BACKGROUND

Ms. Johnson's co-defendant, Jerrell Henry, was released from prison in December of 2012 and moved in with his parents at 220 Hazelwood Terrace. Tr. 421.[1] The victim, Edline Chun, lived alone directly next door and on the same side of the street at 226 Hazelwood Terrace. *Id.* At some point, Mr. Henry overheard Ms. Chun tell his mother that her home had been burglarized, but the burglars did not find her cash. Tr. 617-18. In late December 2012, Mr. Henry met and began a relationship with Ms. Johnson and they quickly moved in together at Ms. Johnson's apartment located at 698 Frost Avenue in Rochester, after Mr. Henry's parole officer approved Ms. Johnson's residence as an appropriate home because she did not have a felony record and did not have any weapons or alcohol at home. Tr. 409, 421-22, 432. Mr. Henry told Ms. Johnson about Ms. Chun's stash of cash, and together they decided to rob Ms. Chun, expecting to find the cash stash. Tr. 617-18.

[1] The transcript is docketed at ECF No. 19, 20, 21 and 22 and referenced as "Tr." The Court cites the page numbers listed in the transcript.

In preparation for the robbery, Ms. Johnson and Mr. Henry visited a Wal-Mart store to purchase a large blue storage tote on January 31, 2013. [2] On the day of the robbery, February 3, 2013, Ms. Johnson, Mr. Henry, and Mr. Henry's "cousin named E" drove to Ms. Chun's house. Tr. 618. Cousin "E" remained in the car as Ms. Johnson and Mr. Henry went to the house and tricked Ms. Chun into letting them in by telling her that they brought her some food. Tr. 619-20. Upon entry, Mr. Henry "mushed" Ms. Chun "down to the ground," and forced Ms. Chun to take them upstairs where they bound her and forced her to "call a bank or a card or something like that and try to make her sign some checks."[3] Tr. 620, 679.

After completing the robbery, Mr. Henry was seen carrying a television and other items out of the house in a "box." Tr. 1073. Ms. Johnson, cousin "E" and Mr. Henry drove away and Mr. Henry directed a fourth person, Jachelle Gaines, who was outside during most of the time of the robbery,[4] to drive Ms. Chun's car, a silver Pontiac Vibe, away as well. *Id.* The next day, Ms. Johnson and Mr. Henry struggled to find someone who would cash the check that Ms. Chun wrote, eventually leading to Ms. Johnson calling Citizens Bank pretending to be Ms. Chun and requesting that she be reminded of the PIN to Ms. Chun's debit card. Tr. 835-45, 898-900.

A few days later, Ms. Johnson called her ex-boyfriend, Gary Brown, "crying and shaken up," to tell him about the robbery. Tr. 615. She told him about how Mr. Henry overheard Ms. Chun talking about her cash. She described that during the course of the robbery, while Mr. Henry collected valuable items to carry out of the house, Ms. Johnson was "consoling" Ms. Chun by stroking her hair and telling her "it was going to be okay." Tr. 620-21. She further explained that

[2] The purchase was recorded by the store's video surveillance cameras. People's Exhibit 38.
[3] People's Exhibit 2 is an audio recording of a phone call that Ms. Chun made to her bank (Citizens Bank) during the time of the robbery, during which she informed them of a transfer that she made in the amount of $20,000 from her money market account to the account linked to her debit card. She also informed her bank that she planned on writing a check in the amount of $18,900 and wanted to make sure that there wouldn't be any problems for the recipient of the check when they tried cashing it.
[4] Ms. Gaines arrived later after being summoned to the house by Mr. Henry, but never went into the house.

she also covered Ms. Chun's mouth with duct tape when someone came to the door and continued to try to soothe her. Tr. 681. Ms. Johnson told Mr. Brown that, at some point, however, Mr. Henry decided to kill. Ms. Johnson recounted to Mr. Brown that Mr. Henry asked Ms. Chun where her gun was, and Ms. Chun told him. Tr. 622-23. Mr. Henry retrieved Ms. Chun's gun, a Mossberg .22 caliber rifle, the bullets, and shot Ms. Chun in the head twice. Tr. 622-23, 778-82. After Mr. Henry murdered Ms. Chun, Ms. Johnson helped Mr. Henry clean up the house. Tr. 623-24. Other than this retelling of what happened, there was no other eyewitness testimony regarding the murder.

The day after the robbery, Ms. Johnson, Mr. Henry, and cousin "E" returned to Ms. Chun's house to continue cleaning and to dispose of Ms. Chun's body. Tr. 625. They used a "bin" to carry her body out of the house and dropped her body in Tryon Park. *Id.* Two days later, a county worker went to Tryon Park to perform a weekly inspection. After finding a tote on the hillside and a body in the creek, he notified the police. Tr. 448-51, 453-55, 457-58, 686. The body was identified as belonging to Ms. Chun. Her wrists and ankles had been bound with duct tape and she had sustained two fatal gunshot wounds to the head. The medical examiner provided police with bullet fragments that had lodged in Ms. Chun's skull. Tr. 460-67, 470, 472-82, 532, 535-38, 545-46, 548-49, 551, 1182.

. . . [The remainder of this "Background" Section is intentionally omitted] . . .

LEGAL STANDARD

28 U.S.C. § 2254 allows a petitioner to challenge her imprisonment from a state criminal judgment on the ground that it is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Where the petitioner raises a claim that was adjudicated in state-court proceedings, she is only entitled to relief if that adjudication "(1) resulted in a decision that

was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(1), (2).

"A principle is 'clearly established Federal law' for § 2254(d)(1) purposes only when it is embodied in a Supreme Court holding, framed at the appropriate level of generality." *Washington v. Griffin*, 876 F.3d 395, 403 (2d Cir. 2017) (internal quotation marks, brackets, and citations omitted). "A state court decision is 'contrary to' such clearly established law when the state court either has arrived at a conclusion that is the opposite of the conclusion reached by the Supreme Court on a question of law or has decided a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Id.* (internal quotation marks omitted). "An unreasonable application occurs when the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case, so that the state court's ruling on the claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (internal quotation marks and ellipses omitted). In analyzing a habeas claim, "[f]ederal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with clear and convincing evidence." *Hughes v. Sheahan*, 312 F. Supp. 3d 306, 318 (N.D.N.Y. 2018) (internal quotation marks omitted). "A state court decision is based on a clearly erroneous factual determination if the state court failed to weigh all of the relevant evidence before making its factual findings." *Id.*

Where, as here, the petitioner is proceeding *pro se*, the district court must read the pleadings liberally and construe them "to raise the strongest arguments they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006).

DISCUSSION

Ms. Johnson contests her convictions on five grounds . . . [, including that] defense counsel provided ineffective assistance of counsel because he failed to raise the affirmative defense to felony murder. ECF No. 1 at 22. . . The Court examines each argument in turn.

. . . [Sections I and II are intentionally omitted] . . .

III. Ineffective Assistance of Counsel

To make a claim for ineffective assistance of counsel, Ms. Johnson must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *Id.* at 688. Nevertheless, "[j]udicial scrutiny of counsel's performance must be highly deferential," presuming that the challenged action might be considered sound trial strategy. *Id.* at 689-90; s*ee also Boyland v. Artus*, 734 F. App'x 18, 20 (2d Cir. 2018) (summary order) ("At the first step, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). A deficient performance is prejudicial where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 697.

. . . [Subsections 1 and 2 are intentionally omitted] . . .

3. Failure to Raise Affirmative Defense to Felony Murder

Finally, Ms. Johnson claims that her Sixth Amendment right to effective assistance of counsel was violated due to her defense counsel's failure to raise the affirmative defense to felony murder. To support a conviction for felony murder, the prosecution had the burden of proving that Ms. Johnson committed a robbery and "in furtherance of such crime … another participant … cause[d] the death of a person other than one of the participants." N.Y. Penal Law § 125.25(3). It is an affirmative defense to a charge of felony murder that the defendant:

> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
>
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

N.Y. Penal Law § 125.25(3).

Assuming a defendant has a reasonable basis for satisfying the essential elements of the affirmative defense, counsel's failure to request a charge to the jury on the affirmative defense will not be found to be defective if there is a reasonable strategic reason for counsel's omission. *Strickland*, 466 U.S. at 690. One such strategic circumstance arises where a defendant is charged with both felony murder and the underlying felony simultaneously. In such a case, counsel may choose not to raise the affirmative defense in order to avoid inviting the jury to convict for the underlying felony. *See Lopez v. Lape*, No. 10 CIV. 397, 2010 WL 3219308, at *4 (S.D.N.Y. Aug. 13, 2010) (Because counsel told his client, "[i]f we look for the charge down, you are in tum

inviting the jury to convict you of the robbery," the federal court agreed with state court's determination that "the decision not to pursue an affirmative defense was a strategic choice").

However, where the felony murder charge arises out of underlying felony conduct for which the defendant has not been charged, "there is no tactical or strategic advantage to avoiding the affirmative defense to felony murder." *Georgiou v. Ercole*, No. 08-CV-2093, 2009 WL 36815, at *4 (E.D.N.Y. Jan. 6, 2009) (quoting *People v. Georgiou*, 38 A.D.3d 155, 160 (2007)). In *People v. Georgiou*, the Appellate Division reasoned as follows:

> "counsel's election to argue to the jury that the defendant did not share [co-defendant's] intent to rob the victim, under the circumstances of this case, was inexplicable and offered the defendant no tactical or strategic advantage. First, the defendant was never in jeopardy of conviction for the underlying robbery. The statute of limitations had run on that charge and therefore it was not contained in the indictment. Thus, the affirmative defense alone, if successful, would have served as a complete defense, relieving the defendant of liability for felony murder as well as for any accessorial liability in the reckless homicide underlying the depraved indifference murder count (*see Matter of Anthony M.*, 63 NY2d 270, 283 [1984]). Second, counsel's argument that the defendant's statement was true and that it showed he did not share Chesney's intent to rob the victim flew directly in the face of the statement itself which, as read to the jury, began: "On that day in the afternoon *me and Dave*, male white, 40's, balding on top with long hair in the back, robbed an old white lady" (emphasis added). Thus, there was no advantage in arguing that the defendant did not share the intent to rob the victim, and the decision not to pursue the affirmative defense gave up a complete defense to no discernible benefit." *Id.* at 160.

In many relevant respects, Ms. Johnson's case is indistinguishable from the facts of *People v. Georgiou* concerning defense counsel's failure to raise the affirmative defense. First, this trial did not put Ms. Johnson at jeopardy for robbery. The indictment did not contain a robbery charge, without which the jury could never have returned a verdict of guilty for robbery. *See People v. Berzups*, 49 N.Y.2d 417, 427 (1980) ("[W]e hold that the underlying felony of the felony murder

charge [is] not a lesser included offense that merge[s] in the conviction for which it [is] the predicate."). Second, although defense counsel pursued a strategy of completely denying Ms. Johnson's participation in the robbery, such a strategy "flew directly in the face" of the overwhelming evidence of her involvement in the robbery and clean-up. "Thus, there was no advantage in arguing that [Ms. Johnson] did not share the intent to rob the victim, and the decision not to pursue the affirmative defense gave up a complete defense to no discernible benefit" whatsoever. *Georgiou*, 38 A.D.3d at 160. Lacking any strategic basis for his choice, defense counsel's failure to raise the affirmative defense to felony murder was objectively unreasonable and deficient. *Strickland*, 466 U.S. at 688.

Failure to request a jury charge on the affirmative defense to felony murder is not prejudicial where the record does not support a reasonable basis for believing that the defendant can show that each element of the affirmative defense can be satisfied. *See Russo v. Keane*, 42 F. App'x 500, 503 (2d Cir. 2002) (summary order) (ineffective assistance of counsel claim based on failure to raise affirmative defense to felony murder failed because defendant testified that he was aware that his co-defendant was carrying a gun, and therefore, could not meet the third and fourth elements of the affirmative defense); *Nuetzel v. Walsh*, No. 00 CIV. 8776, 2006 WL 2742000, at *10 (S.D.N.Y. Sept. 26, 2006) (concluding that the affirmative defense was futile "since the evidence at trial made plain . . . that petitioner knew that Francisco Mendoza had a firearm"); *Green v. Portuondo*, No. 02-CV-4198, 2003 WL 23199872, at *16 (E.D.N.Y. Oct. 27, 2003) (ineffective assistance of counsel claim based on failure to raise affirmative defense to felony murder failed because "[b]ased on defendant's written statements, no reasonable jury could have concluded that petitioner had no reasonable ground to believe another participant in the crime was armed with a deadly weapon"); *Thomas v. Scully*, 854 F. Supp. 944, 958 (E.D.N.Y. 1994) ("The

petitioner was not entitled to a jury instruction concerning the affirmative defense to felony murder because "no reasonable view of the properly admitted evidence," would have permitted the jury to find that [defendant] had established the third element of the affirmative defense.").

On direct appeal, the Appellate Division rejected Ms. Johnson's ineffective assistance of counsel claim, concluding that "the trial evidence did not support that affirmative defense." *People v. Johnson*, 184 A.D.3d 1102, 1105 (4th Dep't 2020). This Court agrees. Specifically, there is no reasonable view of the properly admitted evidence that Ms. Johnson would have been able to prove by a preponderance of the evidence the first and third elements of the affirmative defense.

Ms. Johnson argues that because there is no direct evidence of her knowledge of the gun prior to entering the house, she can assert that she "had no reasonable ground to believe that any other participant was armed with a [deadly] weapon, instrument, article or substance." N.Y. Penal Law § 125.25(3). Even if Ms. Johnson could affirmatively show lack of knowledge upon entering the house and commencing the robbery (notwithstanding the fact that this Court determined otherwise in Section II.2. of this opinion), Ms. Johnson did become aware that Mr. Henry was about to become armed from the moment he asked Ms. Chun for her gun. From that moment, Ms. Johnson had a duty to withdraw from the robbery in order to make out the third element and there is no evidence to suggest that Ms. Johnson did so. Instead, the record shows Ms. Johnson perpetuated the robbery scheme by calling Citizens Bank the following day, pretending to be Ms. Chun in order to continue depleting her bank accounts. *See People v. Jones*, 206 A.D.2d 82, 94 (1st Dep't 1994) (The affirmative defense failed on the third element because of defendant's "continued participation in the underlying crime for some twenty minutes after she saw the gun in an accomplice's hand, as she waited to collect her share of the [robbery] proceeds, belies any claim that she dissociated herself from the crime"); *Davis v. Superintendent, Napanoch Corr. Facility*,

No. 89 CIV. 5760, 1990 WL 160883, at *2 (S.D.N.Y. Oct. 13, 1990) ("It can be inferred that there was some delay between [the principal's] retrieval of the gun and his later shooting of [the victim]. Simply put, if there was enough time . . . to flee the scene before the shooting, then there was enough time for petitioner to intercede and prevent the fatal shooting.").

Moreover, Ms. Johnson would struggle to demonstrate the first element of the affirmative defense as well. The jury returned a verdict of guilty on intentional murder as an accomplice and as discussed, *supra*, such verdict was based on legally sufficient evidence. As a matter of law, a guilty verdict for intentional murder as an accomplice means that the jury was convinced beyond a reasonable doubt that Ms. Johnson aided in the commission of the homicide. See *Supra* at II.2.[illegible]1 ("a person is guilty of intentional murder in the second degree as an accomplice if "when, acting with the mental culpability required for the commission" of intentional murder, she "solicits, requests, commands, importunes, or intentionally aids" the principal in the murder. N.Y. Penal Law § 20.00."). The jury could not then conclude by a preponderance of the evidence that she did not—such a result would be irrational. This result is also supported by the evidence. Ms. Johnson bound and gagged Ms. Chun and persisted in the robbery before during and after the murder. There is no reasonable view of this evidence that Ms. Johnson did not aid in commission of the homicide. Because Ms. Johnson cannot make out the first or the third elements of the affirmative defense, either of which is sufficient to undermine the defense, she cannot show that her defense was prejudiced by defense counsel's deficient performance. Therefore, Ms. Johnson is not entitled to the writ of habeas corpus with respect to her conviction for felony murder because, although defense counsel's performance was deficient, she was not prejudiced by the deficiency.

Not So Fast China: Non-Market-Economy Status is Not Necessary for the "Surrogate Country" Method

André J. Washington*

Abstract

The expiration of Article 15(a)(ii) of the Accession Protocol of the People's Republic of China to the WTO calls into question the legal basis for employing the "surrogate country" method in antidumping investigations. China believes that it is entitled to Market Economy status, which it believes would preclude the use of the "surrogate country" method. The U.S. takes a different approach. Ignoring the protocol, the U.S. takes the position that an obligation to determine "comparable prices" in antidumping investigations affirmatively permits the "surrogate country" method if that method becomes necessary to finding a comparable price. This Comment argues that neither country is completely correct. Market Economy status is inconsequential to antidumping investigations, and the obligation to find a "comparable price" grants the authority to do just that, and nothing more. The legal basis for employing alternative pricing methodologies against China comes from the "particular market situation" principle in Article 2 of the Antidumping Agreement. This principle is based on the situation surrounding the individual sales of the product in the domestic market rather than the overall market situation. That situation becomes "particular" when it is distorted by factors other than supply and demand. The expiration of Article 15(a)(ii) leaves China in the same position as every other WTO Member—susceptible to a case-by-case analysis of the transactions that form the basis of the prices of products that it exports into other markets.

Table of Contents

* J.D. Candidate, 2019, The University of Chicago Law School. I would like to thank Professors Dhammika Dharmapala and Adam Chilton for their valuable feedback throughout the writing process. I would also like to thank the staff of the *Chicago Journal of International Law* for their helpful edits and comments.

I. INTRODUCTION

In international trade law, "dumping" is the technical term for the process of exporting goods at a price that is less than the "normal value" of that product "in the domestic market or third-country markets," or less than the "production cost."[1] WTO law condemns dumping when it "causes or threatens material injury to an established industry . . . or materially retards the establishment of a domestic industry."[2] If it is proven, following an investigation by domestic authorities of the importing country, that a product is being dumped and causing material injury, WTO law permits the importing country to levy an anti-dumping duty on the dumped product, which may not exceed the value of the "margin of dumping."[3] This process of proving an instance of dumping, a resulting injury, and calculating the margin of dumping is called an anti-dumping investigation.

Article VI of the General Agreement on Tariffs and Trade (GATT) details the generally applicable method for calculating dumping margins in anti-dumping investigations.[4] It provides that importing countries should calculate the difference between the product's export price and the price of the product in the domestic market of the exporting country "in the ordinary course of trade."[5] In the absence of a domestic market, or sufficient sales in the domestic market, the investigating authority may use the difference between the export price and either the "highest comparable price for the like product for export to any third country,"[6] or "the cost of production" plus "a reasonable addition for selling cost and profit" to determine the dumping margin.[7]

GATT Article VI operates under the assumption that the domestic market of the exporting country produces reliable prices to which import prices may be compared. However, where it is determined that the exporting country has a state-controlled economy, the WTO recognizes that price comparisons in antidumping investigations may be "difficult,"[8] and thus makes an exception for importing companies to deviate from the specifically articulated methods in Article VI:1 for the purpose of calculating dumping margins.[9]

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1 *WTO GLOSSARY*, WTO, https://perma.cc/PHJ9-3CZJ (last visited Apr. 25, 2018).

2 General Agreement on Tariffs and Trade Art. VI:1, Apr. 15, 1994, 1867 U.N.T.S. 208 [hereinafter *GATT*].

3 *Id.* at art. VI:2.

4 *Id.* at art VI:1-2.

5 *Id.* at art. VI:1(a).

6 *Id.* at art. VI:1(b)(i).

7 *Id.* at art. VI:1(b)(ii).

8 *Id.* at Second Addendum Note, art. VI:1.

9 *Id.*

One such alternative method frequently employed by the U.S. and the E.U. is called the "analogue country"[10] method. It is popular for the same reasons that it is controversial. It permits investigating authorities to unilaterally select a third country whose domestic prices for the product in question are used in place of the actual prices reported by the exporting country.[11] This selection authority gives investigators substantial power to manipulate the outcome of a dumping margin calculation, which is the entire objective of an anti-dumping investigation.[12] This is because the margin of dumping is essential to determining the size of anti-dumping duties. Also, if the margin is not large enough, the investigator may not be able to impose anti-dumping duties at all.[13]

The U.S. and the E.U. find this tool to be especially valuable for antidumping investigations against China. This is the case because the U.S. and the E.U. have each initiated more antidumping proceedings against China (141 and 129 respectively) than any other nation except India (which has initiated 199 antidumping investigations against China).[14] Unsatisfied by what it perceives to be disparate treatment by Western powers, China challenges many of these investigations and files claims at the WTO. China is so active in challenging these measures that it is now a party to a greater percentage of cases before the WTO dispute settlement body than almost any other nation.[15]

China is important to the WTO not only because of the frequency with which it employs the dispute resolution mechanisms, but also because of the sheer size of its economy. China's continued cooperation with WTO rules is important to the smooth functioning of the world economy.[16] Not yet a full market economy and no longer a complete state-controlled economy, China's hybrid situation was not contemplated at the time the WTO agreements were written.[17] Because of

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10 Also referred to as the "Analogous Country," "Surrogate Country," or "third-country" method.

11 *Review of E.U. Trade Defence Instruments in Brief: The Analogue Country Method in Anti-Dumping Investigations*, KOMMERSKOLLEGIUM, https://perma.cc/LE92-P2A3 (last visited Apr. 17, 2018) .

12 *Id.*

13 "The importing country is only entitled to levy an anti-dumping duty when," the margin of dumping produces a "material injury to a domestic industry." Panel Report, *Swedish Anti-Dumping Duties*, ¶8 WTO Doc. L/328 (adopted Feb. 26, 1955).,.

14 Antidumping investigation initiations data with information on reporting country and exporting country available on the WTO website, *Antidumping*, WTO https://perma.cc/2ZPR-ZEZM (last visited May, 5 2018).

15 Mark Wu, The "China, Inc." Challenge to Global Trade Governance, 57 HARV. J. INT'L L. 261, 264 (2016).

16 "China is home to the second largest number of Fortune 500 companies," Four of the largest banks are domiciled in China. And, the largest IPO ever was for a Chinese company. *Id.* at 269.

17 *Id.* at 269.